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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT WILSON, et al.,
Petitioners,

vs.

DONALD E. KUENZI, M.D., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

Whether the State of Missouri's refusal to recognize the medical negligence actions of "wrongful birth" and "wrongful life" violates petitioners' constitutionally protected guarantees of due process, equal protection, and a woman's right to privacy in connection with her decision whether or not to terminate her pregnancy under the Fourteenth Amendment to the United States Constitution and a long line of federal decisions including *Roe v. Wade*, 410 U.S. 113 (1973).

Whether the decision below should be recognized in light of its conflict with all federal cases and the overwhelming majority of state cases contrary.

Whether the court below violated petitioners' Fourteenth Amendment rights to equal protection by improperly exceeding the permissible scope of review applicable to a Motion to Dismiss.

PARTIES BELOW

The parties to the proceeding below were petitioners, Robert Wilson, a minor, and Barbara Wilson and Carl Wilson, and respondents Donald Kuenzi, M.D., and Kuenzi, Hayes, Kirkland, Wilson, M.D.'s, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

The petitioners Robert Wilson, Barbara Wilson, and Carl Wilson respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Missouri entered in the above entitled proceeding on April 19, 1988, motion for rehearing denied May 17, 1988.

OPINION BELOW

The opinion of the Supreme Court of Missouri is not yet reported. It is attached hereto as (Appendix A).

JURISDICTION

The Circuit Court of Jackson County, Missouri dismissed petitioners' causes of action June 8, 1987. A timely appeal to the Supreme Court of Missouri was filed July 6, 1987. On April 19, 1988, the Supreme Court of Missouri, after hearing oral argument, entered its opinion and order affirming the trial court's dismissal. (Appendix A). A timely motion for rehearing to the Supreme Court of Missouri was filed April 28, 1988 (Appendix B) which was denied May 17, 1988.

This petition for writ of certiorari was filed within ninety days of that date. The Court has jurisdiction under 28 U.S.C. Sec. 1257 (3) and United States Supreme Court Rule 17.1(b-c).

The opinion of the state court with respect to the federal issues presented here is final.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

HOW FEDERAL QUESTIONS WERE PRESENTED

Subsequent to passage by the State of Missouri of Section 188.130 R.S.Mo. (1986) (Appendix D), Respondents

filed their Motion to Dismiss Petitioners' actions at the trial court level on April 14, 1987. The court dismissed Petitioners' actions and they appealed to the Supreme Court of Missouri.

Petitioners argued the statute, which extinguished Petitioners' causes of action, was unconstitutional when analyzed in light of the Fourteenth Amendment guarantees established by *Roe v. Wade*, 410 U.S. 113 (1973) (Appendix E, pp. A46, A48, A49, A50, A53-A58) and *City of Akron v. Akron Center for Reproduction Health, Inc.*, 462 U.S. 103 (1983). Appendix E, pp. A55, A57, A58). Petitioners further argued that "wrongful birth" was a recognizable cause of action under *Phillips v. United States*, 508 F.Supp. 544, U.S.D.C. (1981) (Appendix E, pp. A59, A62), and that the Missouri law violated Petitioners' constitutionally protected rights of due process and equal protection under the Fourteenth Amendment. (Appendix E, pp. A55, A57, A64, A67).

Petitioners further argued that the court below was exceeding the permissible scope of review and thereby violating Petitioners' rights to due process. (Appendix B, p. A29)

In point I of their brief submitted to the Supreme Court of Missouri, Petitioners argue Fourteenth Amendment issues extensively. (Appendix E, pp. A46, A49, A50, A54, A55, A58-A61). The thrust of Petitioners' argument is that the State, by failing to recognize the cause of action of "wrongful birth", violates Petitioners' Fourteenth Amendment protections which guarantee a woman's right to privacy in connection with her decision to terminate her pregnancy.

Petitioners further argue that the possibility that a doctor could be held responsible for negligent conduct safeguards that a patient will be fully informed. Removal

of the negligence action safeguard by the State, while not actually preventing a woman from terminating a pregnancy would impede the complete exercise of a woman's rights under *Roe, supra,* and directly infringes on the informed decision making process as enunciated in *Roe.* Petitioners' argument has been embraced by a majority of other jurisdictions when considering whether to impose liability for "wrongful birth". The Supreme Court of Missouri wholly failed to address these constitutional issues as raised in Petitioners' brief. (Appendix A).

Point I of Petitioners' brief notes that at the time of Petitioners' Appeal, seventeen of the nineteen jurisdictions which have ruled on the issue, including four Federal jurisdictions, have recognized "wrongful birth". Four jurisdictions have recognized "wrongful life". Only two jurisdictions failed to recognize "wrongful birth" as a legitimate medical negligence action.

Petitioners further advanced the argument that in light of the overwhelming weight of favorable authority followed by other jurisdictions, Missouri's failure to recognize Petitioners' "wrongful birth" action would amount to a denial of due process of law in violation of the Fourteenth Amendment. (Appendix E, pp. A51, A52, A53, A68, A69). However, the Supreme Court of Missouri also failed to address the constitutional issues raised by Petitioners under this point. (Appendix A).

Point II of Petitioners' brief notes that since the State of Missouri recognizes "wrongful conception" as an actionable medical negligence tort, Fourteenth Amendment guarantees of equal protection require that the medical negligence tort of "wrongful birth" also be recognized. (Appendix E, p. A64). To hold otherwise would be to create

a classification which burdens abortion contrary to *Eisenstadt v. Baird,* 405 U.S. 438 (1972). (Appendix E, pp. A64, A67, A69). Subsequent to the Missouri high court's adverse ruling, Petitioners, in their Motion for Rehearing (Appendix B, pp. A27, A30), again stress the inconsistency which the court's opinion creates. The Supreme Court of Missouri again failed to address the constitutional issues raised by Petitioners' argument under this point. (Appendix A).

Finally, Petitioners pointed out that the court exceeded the permissible scope of review upon consideration of a Motion to Dismiss. (Appendix B, p. A29).

STATEMENT OF THE CASE

This cause involves claims for medical negligence originally filed February 14, 1985, in the Circuit Court of Jackson County, Missouri.

Petitioners are Carl and Barbara Wilson, the parents of Robert Wilson, a minor, born June 23, 1983, and Robert Wilson himself through his mother as Next Friend. Robert was born afflicted with the disorder commonly known as Down's syndrome. Down's syndrome is a genetic disorder which is also commonly referred to as mongolism. The disorder involves serious disabilities such as birth defects of the heart, eyes, ears and marked hypotonia (muscle weakness or floppiness). Down's syndrome is a severe disorder frequently marked by a grotesque facial appearance, distorted features and body parts, and usually severe to moderate mental retardation.

Robert Wilson has tested in the moderately retarded range, and has undergone operations for his eyes and ears. Additionally, he suffers from congenital heart de-

fect and has been engaged in specialized programs and training and has attended schools for the mentally retarded since age 1½ years.

Respondent Donald Kuenzi is a medical doctor specializing in the field of family practice including obstetrics and gynecology, and was at all times relevant to this cause associated with Kuenzi, Hayes, Kirkland, and Wilson, M.D.s, Inc. at its Gladstone, Missouri offices, a suburb of Kansas City, Missouri.

Dr. Kuenzi had provided medical care and treatment to Barbara Wilson since she was a child and continued to care and treat her into adulthood. The care and treatment included attendance of her pregnancy and the birth of her child Robert. Robert was the first and only child born to Barbara and Carl Wilson. Barbara Wilson was born on June 22, 1946. She was thirty-six years old at the time Robert was conceived and thirty-seven years old when Robert was born on June 23, 1983.

It is universally recognized within the medical community that as a woman's age increases, so does the chance that she will give birth to an offspring afflicted with some type of genetic abnormality such as Down's syndrome. The risk escalates dramatically from a less than 1 in 1,000 chance for a woman in her 20's to a 1 in 300 chance for a woman at age 36.

In modern medicine, doctors can readily determine whether a fetus is afflicted with Down's syndrome through a process known as amniocentesis. This procedure involves the withdrawal of a small quantity of amniotic fluid through the abdominal wall by a needle aspiration. The method has been proven to be a safe and accurate procedure. By subsequently analyzing the

fluid and the cells found within it, Down's syndrome can be reliably detected during the early stage of fetal development.

Barbara Wilson has testified that she was not made aware by Dr. Kuenzi of the increased risk of giving birth to a mentally retarded offspring, nor of the availability of amniocentesis to identify genetic defects. Mrs. Wilson further testified that had she been made aware by Dr. Kuenzi of Robert's probable mongolism through amniocentesis, she would have elected to terminate her pregnancy. Dr. Kuenzi admits he discussed none of these matters with Barbara Wilson.

On May 8, 1985, Petitioners filed their First Amended Petition for Damages, in two counts. Count I was the "minor's claim" and Count II was the "parent's claim". Both claims were tort actions for medical malpractice commonly referred to as "wrongful birth" and "wrongful life" actions. Petitioners alleged in their Petition that Defendants were negligent in a number of respects. (Appendix C).

Subsequent to the filing of Petitioners' suit, the State of Missouri passed a statute which purported to retroactively extinguish the causes of action of "wrongful birth" and "wrongful life". See Section 188.130 R.S.Mo. (1986). (Appendix D). Portions of the overall abortion statute of which this section was a part were subsequently held unconstitutional by the United States Court of Appeals for the Eighth Circuit in the case of *Reproductive Health Services, et al. v. William L. Webster, et al.*, ... U.S. ..... (8th Cir. 1988). Section 188.130 was left intact as it had not been a part of the abortion legislation challenged.

The trial court sustained Respondent's Motion to Dismiss on June 8, 1987, based on Section 188.130 R.S.Mo. (1986). Due to the existence of constitutional issues, Petitioners appealed directly to the Supreme Court of Missouri on July 6, 1987. The court heard Petitioners' appeal and after oral argument, by a four to three margin, affirmed the trial court's dismissal on April 19, 1988, on grounds other than the constitutional questions. On May 19, 1988, Petitioners' Motion for Rehearing filed April 28, 1988, was denied.

Disregarding the overwhelming weight of judicial authority on both the state as well as federal level, the Missouri court chose to bootstrap its opinion by quoting and relying on dicta from the dissent in *Becker v. Schwartz,* 386 N.E.2d 807 (N.Y. 1978), a case which actually recognized the cause of action for "wrongful birth". The Supreme Court of Missouri held that the statute could not be applied in this case retroactively. However, the court also held that Missouri does not recognize the causes of action of "wrongful life" and "wrongful birth", and concluded that no such torts exist in the state. The court improperly chose to focus solely on the anticipated problems it perceived Petitioners would have at trial in establishing causation and damages, and affirmed the dismissal solely on those grounds. The court refused to consider Petitioners' arguments that refusal to grant to Petitioners their day in court would deny their constitutional rights under both the United States and Missouri Constitutions.

REASONS FOR GRANTING WRIT

I. The decision below conflicts with the unanimous decisions of Federal District Courts and the overwhelming majority of State Supreme and Appellate Courts and a decision by this Honorable Court is necessary to resolve said conflicts.

The medical negligence tort of "wrongful birth" presented by the instant case has been recognized by each of the federal district courts called upon to render an opinion regarding same. *See Gallagher v. Duke University,* 638 F.Supp. 979 (M.D.N.C. 1986); *Harbeson v. Parke-Davis, Inc.,* 746 F.2d 517 (7th Cir. 1984); *Phillips v. United States,* 658 F.2d 471 (7th Cir. 1981); *Robak v. United States,* 658 F.2d 471 (7th Cir. 1981).

Eighteen state courts called upon to consider the validity of "wrongful birth" tort actions have recognized same:

> Alabama, see Robak v. United States, 658 F.2d 471 7th Cir. 1981); California, see Andalon v. Superior Court, 162 Cal.App. 3d 600, 208 Cal.Rptr. 899 (1984); Florida, see Moores v. Lucas, 405 So.2d 1022 (Fla.Dist. Ct.App. 1981); Idaho, see Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984) (legislatively overridden by IDAHO CODE Section 5-334 (Supp. 1986); Illinois, see Goldberg v. Ruskin, 128 Ill.App.2d 1029, 471 N.E. 2d 530 (1984), aff'd, 113 Ill.2d 482, 499 N.E.2d 406 (1986); Michigan, see Eisbrenner v. Stanley, 106 Mich. App. 351, 308 N.W.2d 209 (1981); New Hampshire, see Smith v. Cote, 128 N.H. 231, 513 A.2d 341 (1986); New Jersey, see Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); New York, see Becker v. Schwartz, 46 N.Y. 2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 815 (1978); North

Carolina, see Gallagher v. Duke Univ., 638 F.Supp. 979 (M.D.N.C. 1986); Pennsylvania, see Gildiner v. Thomas Jefferson Univ. Hosp., 451 F.Supp. 692 (E.D. Pa. 1978); South Carolina, see Phillips v. United States, 508 F.Supp. 544 (D.S.C. 1981); Texas, see Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Virginia, see Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982); Washington, see Harbeson v. Parke-Davis, Inc., 98 Wash.2d 460, 656 P.2d 483 (1983), aff'd, 746 F.2d 517 (9th Cir. 1984); West Virginia, see Jennifer S. v. Kirdnual, 332 S.E.2d 872 (W.Va. 1985); Wisconsin, see Dumer v. St. Michael's Hosp., 69 Wis.2d 766, 233 N.W.2d 372 (1975); District of Columbia, see Haymon v. Wilkerson, 535 A.2d 880 (D.C.Ct.App. 1987).

One state, Maine, has legislatively recognized a cause of action for "wrongful birth". *See* Me.Rev.Stat.Ann. tit. 24 Sec. 2931 (2) (1985).

Other than the Missouri decision forming the basis of the instant appeal, only two states have found "wrongful birth" actions to be invalid. *See Azzolino v. Dingfelder*, 337 S.E.2d 528 (1985); *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986). *But see Gallagher, supra* (limiting the holding in *Azzolino, supra*, to "wrongful birth" claims involving post conception misconduct).

On the legislative front twenty one states have introduced, and five have enacted, legislation prohibiting "wrongful birth" actions, including the State of Missouri's statute which was held inapplicable to the instant case.

To Petitioners' knowledge, no federal court of appeals has considered the validity of the "wrongful birth" action and no petition for certiorari to this Honorable Court to resolve the issue has been heretofore presented.

Prior to *Roe, supra,* the judiciary had not been called upon to decide the instant issue. Since *Roe, supra,* the recent trend had been toward recognizing "wrongful birth" actions as valid medical negligence torts. That trend gave litigants a clear signal regarding the direction the law was taking. After appropriate research, Petitioners herein filed their suit for damages relying on said trend. However, the signals relied upon have now become mixed in that two of the three most recent decisions have failed to recognize the action. (Missouri and Minnesota).

Because of the diversity of opinion among the appellate level state courts, and the various states' legislative activities in this area, it is necessary and desirable for this Court to speak and give final direction regarding which course the law is to follow in its future development.

While not necessary to resolve the issues in the present case, the Court should also pass upon the validity of the minor child's action of "wrongful life" currently recognized in four states. *See Turpin v. Sortini,* 31 Cal.3d 220, 643 P.2d 954, 182 Cal.Rptr. 337 (1982); Colorado, *see Continental Casualty Co. v. Empire Casualty Co.,* 713 P.2d 384 (Colo.App. 1986); New Jersey, *see Procanik v. Cillo,* 97 N.J. 339, 478 A.2d 755 (1984); Washington, *see Harbeson v. Parke-Davis, Inc.,* 98 Wash.2d 460, 656 P.2d 483 (1983), aff'd, 746 F.2d 517 (9th Cir. 1984).

Not acknowledging this cause of action will be more significant in a case unlike the instant one, where the parents might fail to bring their own action for "wrongful birth" leaving only the child to pursue an action for "wrongful life" upon reaching majority.

II. The decision below violates Missouri citizens' rights to equal protection of the law because it creates classifications which do not apply uniformly to all citizens of the State similarly situated.

The opinion below (Appendix A, p. A4), approved the decision of the Missouri Court of Appeals in the case of *Miller v. Duhart*, 637 S.W.2d 183 (Mo.App. 1982). *Miller* recognized the cause of action of "wrongful conception" as a medical negligence tort. By affirming the decision, Missouri now specifically recognizes "wrongful conception", creating a distinction without a difference.

"Wrongful conception" arises from the negligence of a physician committed in connection with a failed birth control attempt, i.e.; a failed sterilization procedure, which results in the birth of a healthy but unwanted child. If however, as in the "wrongful birth" cases, parents are, through medical negligence, deprived of information from which they can make an informed choice to practice birth control by termination of pregnancy, Missouri denies them redress.

The State of Missouri is not applying the law of the State equally to its similarly situated citizens. Those who attempt birth control by sterilization are favored over those who would attempt birth control by termination of the pregnancy. The decision sets up a distinction which is not genuine and substantial, resulting in unequal treatment of those similarly situated. It singles out for special application the group of parents, such as Petitioners, making procreative decisions which involve terminating a pregnancy. Only those parents who chose to terminate the pregnancy are precluded from suing their doctor when the doctor's negligent conduct interferes with their procreative autonomy.

Since the Supreme Court of Missouri chose to specifically consider *Miller, supra,* it could have chosen to eliminate all "wrongful birth" actions, whether based upon sterilization or birth control on the one hand, or on termination of pregnancy on the other. If it had opted to eliminate all "wrongful birth" actions the court could have attempted to eliminate equal protection objections, but it chose not to do so. Therefore, the only logical interpretation to place upon its decision is that the court set apart for unequal treatment those who chose to exercise birth control by abortion. This is exactly what the Missouri statute, which the court held inapplicable to this case, attempts to do. (Appendix D).

The court's decision is neither justified by a compelling state interest nor related to a legitimate state governmental purpose. Therefore, the State of Missouri has created an unconstitutional classification which cannot be allowed to stand. *See Roe, supra; Eisenstadt v. Baird, supra; see also Wrongful Birth Actions: The Case Against Legislative Curtailment,* 100 Harvard L. Rev. 2017 (June 1987).

III. The decision below denies to Missouri citizens constitutionally guaranteed rights to privacy and infringes parental rights to make autonomous, informed procreative decisions thereby violating the due process clause of the Fourteenth Amendment.

Impleat in the due process clause of the Fourteenth Amendment is the right to freedom of personal choice in matters of family life. *Carey v. Population Services International,* 431 U.S. 678 (1977).

Roe, supra, and its progeny, make it clear that a woman's right to decide whether or not to terminate a

pregnancy is a right of personal privacy founded upon an individual's interest in independence in making certain kinds of important decisions guaranteed by the Fourteenth Amendment. *See Whalen v. Roe*, 429 U.S. 589, 599 (1977); *City of Akron v. Akron Center for Reproductive Health*, 103 S.Ct. 2481 (1983); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1974).

The State of Missouri, by refusing to recognize Petitioner's right to pursue a medical negligence action against her negligent physician, is interfering with the doctor-patient relationship in connection with the consultation process necessary for the meaningful exercise of a woman's decision whether or not to terminate her pregnancy. Such interference unduly burdens a woman's rights to privacy as established in *Roe, supra*, under the Fourteenth Amendment to the United States Constitution.

Such state interference can only be justified in order to further a compelling state interest, such as safeguarding the health of the mother, maintaining medical standards, and protecting the potentiality of human life. However, the lower court decision does not rely on the existence of these safeguards to eliminate a citizen's right to maintain a medical malpractice action. The decision of the lower court is therefore unconstitutional.

This Court has recognized that a woman is entitled to rely on her doctor for advice in order to make an informed decision of whether or not to terminate a pregnancy. *See Roe, supra*, at 153, *Carey, supra*, at 685.

By allowing the lower court decision to stand, doctors will become licensed to withhold information regarding a woman's risk of bearing a child with birth

defects, thereby setting precedence which will allow the state to impermissibly intrude into the physician-patient consultation and thereby undermine the essential reliance a woman places upon the advice of her doctor. By prohibiting a malpractice action, the state interferes with the normal function of the doctor-patient relationship and infringes upon the physician's professional responsibilities.

The lower court's decision removes a powerful check on the conduct of the attending physician, the individual upon whom the woman is entitled to rely for full advice in connection with her pregnancy. Prohibition of the malpractice action strips the physician of his duty to meaningfully inform his patient. The possibility that a doctor will be held responsible for negligent conduct stands as a safeguard that the patient will be fully informed.

In *Roe*, this Court recognized the importance of the patient's access to the courts for the purpose of instituting medical malpractice actions as a check on the physician's duty to inform. *Roe* stated that:

> "If an individual practitioner abuses the privilege of exercising proper medical judgment the usual remedies, judicial and intra-professional, would be available." *Roe* at 166.

Removal of the negligence action safeguard by the Missouri court, while not actually preventing a woman from terminating a pregnancy, does impede the complete exercise of a woman's rights under *Roe*, and is a direct infringement on the informed decision making process as enunciated in *Roe*. This fact has been heretofore recognized by federal courts when considering

whether or not to impose liability for "wrongful birth". *See, Robak v. United States, supra,* and *Phillips v. United States, supra.*

Without the threat to the physician of the patient's right to resort to the courts for redress of the physician's malpractice, whether by failure to properly inform and/or test the patient, there is no incentive for the physician to ever discuss with a patient any medical information which would cause that patient to terminate a pregnancy if such choice would prove contrary to the physician's personal beliefs regarding same. This fact will deprive women of information from which they could exercise their constitutionally guaranteed freedom of choice. Many physicians do not favor abortion for moral and/or religious reasons and will only discuss genetic counseling or testing based on the fear of potential litigation should a mentally retarded child be born to the patient. *See Wrongful Birth Actions: The Case Against Legislative Curtailment, supra,* at 2025; *Bell, Legislative Intrusion Into The Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability,* 35 Syracuse L. Rev. 939, 966-68 (1984).

Removing the threat of court action for malpractice upsets the balance which potential medical malpractice litigation strikes between the patient as a layperson and her physician as a specialist. The result is to unduly burden the woman's freedom of personal choice in this important matter. Clearly, the decision of the lower court has a legally significant impact or consequence on both the abortion decision and the physician-patient relationship. To justify such an infringement by the state, its actions must further a compelling state interest, which, in the instant case it does not.

Far from furthering the interests of the citizens of the State of Missouri, the decision of the lower court encourages the lowering of the acceptable standard of medical care in the State, and increases health risks to pregnant women by encouraging the diminishment of prenatal medical information.

IV. The Court below improperly exceeded the permissible scope of review when considering Respondent's Motion to Dismiss by basing its dismissal of Petitioners' actions on matters not subject to the court's review, thereby denying Petitioners due process of law.

At both the trial court and Supreme Court of Missouri level, Respondents challenged Petitioners' action with a Motion to Dismiss.

The scope of review by the court under such circumstances is limited. All material allegations of the complaint are to be accepted as true and liberally construed in favor of Plaintiff. *See Barnes v. Dorsey*, 480 F.2d 1057 (8th Cir. 1973).

The petition in the instant cause pleads medical negligence. (Appendix C, pp. A40-A41). Therefore, the allegations of medical negligence for the purposes of the Motion to Dismiss were to be taken as true upon a review of the case by the Supreme Court of Missouri. Under the permissible scope of review, Petitioners were to be presumed to have satisfied the evidentiary hurdles of causation and damages, if their petition adequately set forth these elements, which it did.

The Supreme Court of Missouri, in its search to find some basis upon which to invalidate Petitioners' causes of action, focused on causation and damages. (Appendix A, pp. A5-A11).

Such improper expansion of the permissible scope of the court's review denies to Petitioners due process as guaranteed by the Fourteenth Amendment.

For the Supreme Court of Missouri to refuse to recognize and address the important and overriding constitutional issues raised by Petitioners' argument, and base their decision solely on issues of causation and damages, is a prejudicial denial of Petitioners' constitutional protections guaranteed by the United States Constitution. Such injustice must be remedied.

CONCLUSION

The cornerstone of tort law is the assurance of full compensation to injured parties. It is incumbent upon the courts to keep the common law equal to the problems of life. It was to prevent the state from infringing upon citizen's rights that our forefathers sought and presided over enactment of our constitution. It is this Court's responsibility to further and protect constitutionally guaranteed rights within the exercise of the rightful power and authority conferred upon this Court.

For all the reasons contained herein, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Missouri.

Respectfully submitted,

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APPENDIX

"APPENDIX A"

(FILED APRIL 19, 1988)

SUPREME COURT OF MISSOURI
en banc

No. 69592

ROBERT WILSON, et al.,
Plaintiffs-Appellants,
v.
DONALD E. KUENZI, M.D., et al.,
Defendants-Respondents.

Appeal From the Circuit Court of Jackson County
Honorable William W. Ely, Judge

This cause involves civil actions for damages for wrongful birth brought by Carl and Barbara Wilson on their own behalf and for wrongful life brought by Barbara Wilson as mother and next friend of Robert Wilson, a minor. The appeal is from an order of the Jackson County Circuit Court dated June 8, 1987, dismissing both causes of action pursuant to respondent's Motion To Dismiss filed April 14, 1987. The dismissal was based on the language of § 188.130, RSMo 1986, effective August 13, 1986, and appeal was to this Court because of the constitutional issues

raised concerning the statute. Mo. Const. art. V, § 3. Although determination of this cause may not necessitate reaching the constitutional issues, we decide the cause because of its general interest and importance. Mo. Const. art. V, § 10. We affirm the action of the trial court dismissing the actions, but we do so for different reasons.

Prior to adoption of the statute in question, identical motions to dismiss had been filed and overruled on May 31, 1985.

I

Appellant Barbara Wilson was age 36 at the time of conception and age 37 at the time of the birth of Robert Wilson on June 23, 1983. Robert was born afflicted with a genetic disorder commonly known as Down's Syndrome. The risk of such birth defect is approximately 1 in 1000 for women in their twenties, and escalates to approximately 1 in 300 for a woman age 36. It is not disputed that such a defect can be detected by a test known as amniocentesis, administered in the fourteenth week of pregnancy or thereafter, and that respondent doctor neither told appellants of the availability of such test nor counseled appellants regarding the chances of the baby being born with such birth defect by reason of appellant mother's age. Appellants allege that the mother was therefore denied the ability to make an informed decision to abort the pregnancy, which she alleges she would have done, had she been advised of the fact that the fetus was afflicted with the disorder. The wrongful life action of the minor relies on the assumption that the mother would have aborted the fetus and that he would not have been born. Both causes of action allege that it was negligence of the respondent doctor to fail to advise the appellant mother of the availability of the amnio-

centesis test, or to order such test, and to counsel her as to the results of the test so that she could make an informed decision as to whether or not to have an abortion. For the purpose of these motions we assume that experts would testify that today a physician, following acceptable standards of practice in caring for a 36 year-old pregnant woman, should advise the mother of the availability of the test and counsel her accordingly, leaving the mother the responsibility of deciding whether or not she will abort the pregnancy.

The 1986 statute relied on by the circuit court reads as follows:

> 1. No person shall maintain a cause of action or receive an award of damages on behalf of himself or herself based on the claim that but for the negligent conduct of another, he or she would have been aborted.
>
> 2. No person shall maintain a cause of action or receive an award of damages based on the claim that but for the negligent conduct of another, a child would have been aborted.

Section 188.130, RSMo 1986.

Clearly Section 1 intends to preclude wrongful life actions and Section 2 intends to preclude wrongful birth actions.

II

Our reading of § 188.130, RSMo 1986 discloses no legislative intent on its face that the statute have retrospective application. In general, statutes are not applied retrospectively. The Missouri Constitution, Article 1, § 13, prohibits retrospective application of a statute unless there is clear legislative intent to give it retrospective operation either

by express language or by implication, and the statute is procedural only and does not affect any substantive right of the parties. *Pipe Fabricators, Inc. v. Dir. of Rev.*, 654 S.W.2d 74, 77 (Mo. banc 1983); *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 34 (Mo. banc 1982); *State ex rel. St. Louis-San Francisco Railway v. Buder*, 515 S.W.2d 409, 410 (Mo. banc 1974). The effective date of the statute being August 13, 1986, the statute has no application to this case.

III

The question confronting the court is whether Missouri would have recognized these causes of action in 1983, some three years prior to adoption of the statute. This Court has not directly addressed either the action for wrongful birth or the action for wrongful life. Denying the motion for rehearing or transfer, we did permit a suit for "wrongful conception" to stand in *Miller v. Duhart*, 637 S.W.2d 183 (Mo. App. 1982).

Most of the cases in this field have come down in the last two decades, primarily since *Roe v. Wade*, 410 U.S. 113 (1973) and its partial legitimization of abortion. All of the cases can be found and are thoroughly discussed, in five law journal and law review articles published since 1980.[1]

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1. Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 Harv.L.Rev. 2017 (1987); Bell, *Legislative Intrusions Into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 Syracuse L. Rev. 939 (1984); Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death and Wrongful Birth: Time for a New Framework*, 22 J. Fam. L. 677 (1983-1984); Rogers III, *Wrongful Life and Wrongful Birth: Medical Malpractice In Genetic Counseling and Prenatal Testing*, 33 S.C.L. Rev. 713 (1982); Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 Fam.L.Q. 15 (1980).

Although the two actions, wrongful life and wrongful birth, sound synonymous, they differ significantly. The wrongful life action is brought solely by or on behalf of the child who sues for damages stemming from the fact of his or her birth on the theory that were it not for the negligence of the defendant, he or she would not have been born. The action for wrongful birth is an action brought by one or both of the parents of a child born as the result of some form of negligence of the defendant. The damages generally alleged are for pain and suffering, emotional distress, loss of consortium, loss of wages, medical expenses and the cost of raising the child.

A

The Wrongful Life Action

In a comprehensive article reviewing "The Defective Child and The Actions For Wrongful Life and Wrongful Birth," it was the conclusion of the author that "[t]o date, the wrongful life action has met with no success" and that "[t]he most common reason given is the difficulty, if not impossibility, of assessing damages." Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 Fam.L.Q. 15, 40 (1980). A similar conclusion was reached by another author.

> In summary, a historical review of wrongful life claims indicates that they have not been received favorably by the courts; seven of the eight jurisdictions that have considered wrongful life claims do not presently recognize their validity, and one jurisdiction remains unsettled. Dissatisfied life and unplanned life claims have been uniformly unsuccessful. The overwhelming majority of these deci-

> sions deny the claims because of conceptual difficulties in the calculation of damages created by the perceived necessity of comparing impaired life with nonexistence, based on considerations of the sanctity of all human life notwithstanding incidental defects. The few cases recognizing wrongful life claims have focused on the pain and suffering attributable to the defect, without convincingly rebutting the theoretical or philosophical problems attendant to the damage calculation.

Rogers, III, *Wrongful Life and Wrongful Birth: Medical Malpractice In Genetic Counseling and Prenatal Testing,* 33 S.C.L.Rev. 713, 729-30 (1982). (Footnotes omitted.)

We share the view of the overwhelming majority of courts and conclude that the trial court reached the correct result in dismissing the count for wrongful life brought by the mother as next friend of the child, even though the trial court may have done so for another reason.

B

The Wrongful Birth Action

Plaintiff parents suing for wrongful birth have met with more and varied degrees of success. All courts permitting recovery have been presented with serious problems. Damages for pain and suffering of the parents have been rejected by the highest courts of New York, *Becker v. Schwartz,* 46 N.Y.2d 401, 413, 386 N.E.2d 807, 813, 413 N.Y.S.2d 895, 901 (1978) and Texas, *Jacobs v. Theimer,* 519 S.W.2d 846, 849 (Tex. 1975), but have been allowed in New Jersey, *Berman v. Allen,* 80 N.J. 421, 404 A.2d 8, 14-15 (1979).

The some seventeen states[2] permitting recovery have justified their action on grounds such as

> 1) encouraging an attitude of reverence for human life; 2) holding parents responsible for the care of children they bring into society; 3) improving the quality of human existence; 4) protecting the procreative rights of individuals; 5) holding tortfeasors liable for damages proximately caused by their actions; and 6) encouraging competent medical care for all.

Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a New Framework*, 22 J.Fam. L. 677, 695 (1983-1984). The cases have gone all over the place on damages. *See* Collins, *supra* at 696-700.

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2. Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 Harv.L.Rev. 2017, 2018 n.5 (1987) lists the following jurisdictions recognizing a cause of action for wrongful birth: Alabama, *see Robak v. United States*, 658 F.2d 471 (7th Cir. 1981); California, *see Andalon v. Superior Court*, 162 Cal.App.3d 600, 208 Cal. Rptr. 899 (1984); Florida, *see Moores v. Lucas*, 405 So.2d 1022 (Fla. Dist. Ct. App. 1981); Illinois, *see Goldberg v. Ruskin*, 128 Ill.App.3d 1029, 471 N.E.2d 530 (1984), *aff'd*, 113 Ill.2d 482, 499 N.E.2d 406 (1986); Maine, *see* Me.Rev.Stat.Ann.tit. 24, § 2931(2) (1986); Michigan, *see Eisbrenner v. Stanley*, 106 Mich.App. 351, 308 N.W.2d 209 (1981); New Hampshire, *see Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986); New Jersey, *see Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); New York, *see Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); North Carolina, *see Gallagher v. Duke Univ.*, 638 F.Supp. 979 (M.D.N.C. 1986); Pennsylvania, *see Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F.Supp. 692 (E.D. Pa. 1978); South Carolina, *see Phillips v. United States*, 508 F.Supp. 544 (D.S.C. 1981); Texas, *see Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); Virginia, *see Naccash v. Burger*, 223 Va. 406, 290 S.E.2d 825 (1982); Washington, *see Harbeson v. Parke-Davis, Inc.*, 98 Wash.2d 460, 656 P.2d 483 (1983), *aff'd*, 746 F.2d 517 (9th Cir. 1984); West Virginia, *see Jennifer S. v. Kirdnual*, 332 S.E.2d 872 (W.Va. 1985); and Wisconsin, *see Dumer v. St. Michael's Hosp.*, 69 Wis.2d 766, 233 N.W.2d 372 (1975).

Many of the damage discussions sound far more like discussion of public policy doctrine considerations rather than discussions of the traditional damage rules. Those who give lip service to the so-called benefit—offset rule, offsetting the benefit of having the child against traditional tort damages, put the parents in the position of having to prove that the child is neither wanted nor is of benefit to them if they are to recover substantial damages. This illustrates the potential damage that can be done to the already defective child and the near impossibility of dealing with the problem in terms of traditional tort-damage rules.

A reading of all of the cases persuades us that the real underlying problem in these cases stems from the fact that the courts have either closed their eyes to traditional tort causation, or have leaped over causation. Most courts have tried to cover the leap over causation by blending some causation language into their discussion of damages or into their discussions of public policy considerations.

The most thorough analysis and discussion of causation found in any of the prior cases is the dissenting in part and concurring in part opinion of Judge Wachtler appearing in the early case of *Becker v. Schwartz*, 46 N.Y.2d 401, 417-422, 386 N.E.2d 807, 816-19, 413 N.Y.S.2d 895, 904-907 (1978), where he concurred in dismissing the wrongful life claim and said that the wrongful birth claim also should be dismissed.

> A doctor who provides prenatal care to an expectant mother should not be held liable if the child is born with a genetic defect. Any attempt to find the physician responsible, even to a limited extent,

for an injury which the child unquestionably inherited from his parents, requires a distortion or abandonment of fundamental legal principles and recognition, by the courts, of controversial rights and duties more appropriate for consideration and debate by a legislative body. These problems, which are always present when the child born with a genetic disorder seeks to hold the doctor responsible, are compounded when the parents seek compensation, on their own behalf, for collateral injuries occasioned by emotional distress or the increased cost of caring for a handicapped child.

The heart of the problem in these cases is that the physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by the doctor. In addition it is incurable and was incurable from the moment of conception. Thus the doctor's alleged negligent failure to detect it during prenatal examination cannot be considered a cause of the condition by analogy to those cases in which the doctor has failed to make a timely diagnosis of a curable disease. The child's handicap is an inexorable result of conception and birth.

. . . Even if we assume, as we must on a motion to dismiss the complaint, that the parents would have made all the difficult decisions leading to an abortion—a conclusion which could be certain, if ever, only in retrospect—we must still go to great lengths to find that the doctor's failure to detect the defect was the cause, indeed the proximate cause, of the child's handicapped life. And the causal relationship is even more remote when the parents seek to recover for an injury they have suffered as a result of the alleged injury to the child.

But the problems extend beyond causation. . . .

Since the infant's suit must be dismissed, the parents' cause of action for the costs of "special treatment, teaching care, medical services, aid and assistance throughout the lifetime of the infant" should be dismissed as well. A parent's right to recover expenses occasioned by an injury to the child "is based upon and arises out of the negligence which causes the injury to the child. The injury to the child results in a twofold action, one for the father and one for the child." [Citations omitted.] Thus the parents' suit for the pecuniary losses is derivative; it cannot stand alone. (*Reilly v. Rawleigh*, 245 App. Div. 190, 281 N.Y.S. 366; *Kotary v. Spencer Speedway*, 47 A.D.2d 127, 365 N.Y.S.2d 87; *O'Hearn v. O'Hearn*, 55 A.D.2d 766, 389 N.Y.S.2d 651; cf. *Maxson v. Tomek*, 244 App.Div. 604, 280 N.Y.S. 319, mot. for lv. to app. den. 268 N.Y. 726, 280 N.E. 321). If the child cannot establish a good cause of action to recovery for its injury, the parents' suit for collateral losses, flowing from the injury to the child, must also fail (see, e.g., *Gleich v. Volpe*, 32 N.Y.2d 517, 346 N.Y.S.2d 806, 300 N.E.2d 148; *Warmsley v. Long Is. Banana Co.*, 35 N.Y.2d 953, 365 N.Y.S.2d 173, 324 N.E.2d 553; see, also, *Glendenning v. Feld*, 285 App.Div. 604, 135 N.Y.S.2d 670).

The majority disregarding this principle, has held instead that the doctor owed a duty directly to the parents and thus they may recover, for a violation of their own rights, the special costs of raising the handicapped child. This involves the creation of a completely new tort.

. . .

> In sum, by holding the doctor responsible for the birth of a genetically handicapped child, and thus obligated to pay most, if not all, of the costs of lifetime care and support, the court has created a kind of medical paternity suit. It is a tort without precedent, and at variance with existing precedents both old and and new. Indeed the members of the majority are divided among themselves as to what principle of law requires the doctor to pay damages in this case. The limits of this new liability cannot be predicated. But if it is to be limited at all it would appear that it can only be confined by drawing arbitrary and artificial boundaries which a majority of the court consider popular or desirable. This alone should be sufficient to indicate that these cases pose a problem which can only be properly resolved by a legislative body, and not by courts of law.

Becker v. Schwartz, 46 N.Y.2d 401, 417-22, 386 N.E.2d 807, 816-19, 413 N.Y.S.2d 895, 904-07 (1978) (Wachtler, J. concurring in part and dissenting in part).

We find no case which has directly and effectively dealt with the problems of causation raised by Judge Wachtler. All, in our opinion, have either closed their eyes to the requirements of causation; or, have blended causation into social policy reasons for permitting recovery; or have blended causation into the discussion of the types of damage permitted to be recovered.

Those who have practiced family law during the past two decades have with some frequency become painfully aware of the difficulty of satisfactorily determining and knowing the real reason why a given woman may or may

not choose to have an abortion. In the wrongful birth action, the right to recovery is based solely on the woman testifying, long after the fact and when it is in her financial interest to do so, that she would have chosen to abort if the physician had but told her of the amniocentesis test. The percentage of women who under pressure refuse to consider abortion, whether for reasons of religious belief, strong motherly instincts, or for other reasons, is sometimes astounding. It would seem that testimony either more verifiable based upon experience or more verifiable by some objective standard should be required as the basis for any action for substantial damages.

A finding by this Court today that we will not create and will not recognize either a new tort for wrongful life or for wrongful birth is in our opinion totally compatible with the policy considerations expressed by our legislature in attempting to limit the statute of limitations for malpractice actions, § 516.105, RSMo 1984;[3] attempting to place a cap or limit on malpractice recoveries, §§ 538.205-.235, RSMo 1986; and attempting legislative tort reform in general, H.B. 700, Laws of Mo., 1987 p. 792.

Having denied the existence in this state of either a cause of action for wrongful life or for wrongful birth, it is unnecessary for us to reach the question of the constitutionality of § 188.130, RSMo 1986.

The trial court reached a correct result on both dismissals, although for a different reason.

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3. Section 516.015 was held unconstitutional as it applied to minors in *Strahler v. St. Luke's Hospital*, 706 S.W.2d 7 (Mo. banc 1986).

The action of the trial court in dismissing both the count for wrongful life and the count for wrongful birth is affirmed.

Warren D. Welliver, Judge

Blackmar, J. concurs in separate opinion filed 5-19-88; *Robertson*, J., concurs in separate opinion filed;

Donnelly, J., concurs and concurs in separate concurring opinion of Robertson, J.;

Higgins, J., dissents in separate opinion filed;

Billings, C.J., dissents in separate opinion filed and concurs in separate dissenting opinion of Higgins, J.; *Rendlen*, J., dissents and concurs in separate dissenting opinion of Higgins, J.

(Filed May 17, 1988)

SUPREME COURT OF MISSOURI
en banc

No. 69592

ROBERT WILSON, et al.,
Plaintiffs-Appellants,

vs.

DONALD E. KUENZI, M.D., et al.,
Defendants-Respondents.

CONCURRING OPINION

I reviewed Judge Higgins' dissenting opinion and the transcript of the oral argument, along with the motion for rehearing. I agree with Judge Higgins that the petition sufficiently would plead a claim of malpractice in favor of appellant Barbara Wilson, if the element of damages adequately appeared. At oral argument, however, there was an exchange with plaintiffs' counsel as follows:

Q. Is the only damage that you claim damage based on the thought that had this test been performed it would have indicated circumstances which would have led your client to have an abortion?

A. That's right, your Honor.

Q. That's the sole damage claim you make?

A. That's right. She has so testified that had she been advised she would have had an abortion.

. . .

I agree with the principal opinion that our Court should not award damages of the kind claimed. It is appropriate that counsel be bound by statements during oral argument. These show that Barbara Wilson cannot maintain the only claim she asserts, and so was not aggrieved by the judgment.

Charles B. Blackmar, Judge

(Filed April 19, 1988)

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NO. 69592

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CONCURRING OPINION

The principal opinion declines to recognize causes of action for wrongful life and wrongful birth in this state. I concur completely. The principal opinion's conclusion that Section 188.130, RSMo 1986, is not applicable is entirely correct. Yet even were we faced with legislative silence on this issue and even if the principal opinion's causation discussion on the wrongful birth issue were not so irrefutable and the impossibility of determining damages in wrongful life cases so obvious, I would not vote to recognize either cause of action.

Courts are ill-equipped to render the policy decisions which the adoption of these causes of action require. Courts unquestionably possess the authority under the common law to recognize new causes of action. That some courts have stepped into the void and allowed such actions

is no reason for this Court to follow. Authority is but the threshold consideration. The more critical question is this: Should judges decide this issue? I adhere to the view that choices which dramatically alter the landscape of societal relationships are best made in the crucible of the free-ranging debate and broad fact-gathering capacity in which representative assemblies regularly indulge. Unlike judges, members of legislatures are directly accountable to an attentive electorate. The people are the ultimate arbiters of societal policy; their elected representatives should make such momentous choices, not judges.

The principal opinion cites the impossibility of assessing damages in wrongful life actions. Speculation in this arena, however, is not limited to the question of damages. Wrongful life actions ask juries to tread where mortals cannot go, to weigh the *cost* of life—even handicapped life—against the *benefit* of no life at all. Theologians, philosophers, theologoumenants and yes, even judges, sink quickly and irretrievably into a quagmire when they stray into questions such as these. The difficulties are endless, the conundra profound.

Today we wisely choose to leave the future of these issues in legislative hands.

I concur in the principal opinion.

Edward D. Robertson, Jr., Judge

(Filed April 19, 1988)

SUPREME COURT OF MISSOURI
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Respondents.

DISSENTING OPINION

The principal opinion would exonerate a physician guilty of gross negligence, or even an intentional wrong, and preclude and foreclose an action for wrongful life or wrongful birth. The conclusions concerning causation and assessment of damages ignore the fact that both common law and statutory law have demonstrated, time and time again, that these "reasons" are not sound; further, respectable courts in other jurisdictions have demonstrated these shibboleths are not insurmountable. A person may very well be faced with a difficult standard of proof, but our system of justice should at least afford one an opportunity to present evidence of injury, causation and damages.

The principal opinion ignores the equal protection, due process, open courts, and trial by jury provisions of

the Constitution of Missouri, as well as similar constitutional guarantees found in the United States Constitution. This State's guarantees are:

> ". . . that all persons are created equal and are entitled to equal rights and opportunities under the law. . . ."

Mo. Const. Art. 1, § 2.

> "That no person shall be deprived of life, liberty or property without due process of law."

Mo. Const. Art. 1, § 10

> "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay."

Mo. Const. Art. 1, § 14

> "That the right of trial by jury as heretofore enjoyed shall remain inviolate . . . ."

Mo. Const. Art. 1, § 22(a)

The open courts provision provides a forum for plaintiffs, as persons allegedly wronged by defendant, to present evidence to a jury in support of their allegations, rather than be barred from the courthouse where others are permitted to present their claims. Perceived difficulty of proof should not override constitutional guarantees.

The emotional and controversial issue of abortion should not control or influence the decision in this case. Neither should the enactment of so-called "tort reform"

legislation - the constitutionality of which must await another day.

I would hold the common law governs this case and reverse the judgment of the trial court dismissing the action; alternatively, that § *188.130, RSMo 1986*, violates the Constitution of Missouri.

William H. Billings, Chief Justice

(Filed April 19, 1988)

SUPREME COURT OF MISSOURI
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Respondents.

DISSENTING OPINION

With due respect for the principal opinion, I find myself in dissent for the reasons that follow.

On defendants' motion to dismiss, plaintiffs' petition (First Amended Petition for Damages) was dismissed by the trial court for failure to state a cause of action. I believe this presents the only question ripe for discussion in this case.

On a motion to dismiss for failure to state a cause of action, the reviewing court accepts as true the facts properly pleaded, giving the averments a liberal construction, and making those reasonable inferences fairly deductible from the facts stated. *Stiffelman v. Abrams,* 655 S.W.2d 522 (Mo. banc 1983); *Concerned Parents v. Caruthersville School District,* 548 S.W.2d 554 (Mo. banc 1977). In this judgment of sufficiency of the petition, the Court is not concerned with what the evidence may prove. *Empire Gas, Inc., of Noel v. Hoover Ball & Bearing Co.,* 507 S.W.2d 657 (Mo. banc 1974).

Plaintiffs Carl and Barbara Wilson are the parents of plaintiff Robert Wilson, born June 23, 1983, afflicted with Down's Syndrome. Defendant Donald Kuenzi is a medical doctor specializing in family practice including obstetrics and gynecology in an association of Kuenzi, Hayes, Kirkland and Wilson, M.D.s, Inc., in Gladstone, Clay County, Missouri.

Plaintiffs' petition is in two counts, I for the minor's claim and II for the parents' claim.

They alleged that defendants were negligent:

1. By failing to advise and warn the mother that she was statistically at risk to give birth to a Down's Syndrome child because of her advanced age at conception;

2. By failing to offer or perform the test known as amniocentesis;

3. By failing to offer or perform genetic counseling;

4. By failing to refer the mother to a specialist for genetic counseling;

5. By failing to disclose facts to the mother from which she could make an informed choice to terminate her pregnancy;

6. By failing generally to adhere to the requisite standard of care required of health care providers;

7. That as a direct and proximate result of defendant's negligence, plaintiffs were damaged.

Following entry of the dismissal of the First Amended Petition, plaintiffs moved, unsuccessfully, to set aside the dismissal and secure leave to file a Second Amended Petition which alleged that defendants were negligent:

1. By realizing the mother was at risk to give birth to a mentally retarded child, or legally held to realize the risk;

2. By knowing the mother did not realize the risk, and failing to advise and warn her of the risk;

3. By failing to advise the mother of the existence and availability of amniocentesis;

4. By failing to advise the mother of pertinent facts concerning her pregnancy thereby denying her the opportunity to make an informed choice with respect to termination of her pregnancy;

5. By failing generally to adhere to the requisite standard of care required of health providers;

6. By failing to advise the mother of genetic counseling and testing with respect to determining whether to carry her pregnancy to full term;

7. By failing to advise the mother fully thereby depriving her of opportunity to make an informed choice with respect to her pregnancy;

8. That as a direct result of defendants' negligence, plaintiffs were damaged.

In my opinion, plaintiffs' petition survives defendant's Motion to Dismiss under the tests of *Stiffelman*, *Concerned Parents* and *Empire Gas* and the standard enunciated in *Aiken v. Clery*, 396 S.W.2d 668 (Mo. 1965), that a doctor who fails to adhere to the standard of reasonable care is guilty of malpractice whether consisting of improper care and treatment or of failure to inform sufficiently to enable the patient to make a judgment and give informed consent with respect to treatment. In short, the pleading demonstrates the requisite elements of a cause of action of duty,

breach of duty, proximate cause and damage. Although the ascertainment of damages may be difficult in this case, the alleged tortfeasor cannot escape liability simply because damages cannot be measured with exactness. *Ohlensdorf v. Fernstein*, 670 S.W.2d 930 (Mo.App. 1984).

Apropos this case is the observation by Professor Prosser:

> There is no necessity whatever that a tort must have a name. New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. The intentional infliction of mental suffering, the obstruction of the plaintiff's right to go where he likes, the invasion of his right of privacy, the denial of his right to vote, the conveyance of land to defeat a title, the infliction of prenatal injuries, and the alienation of the affections of a parent, to name only a few instances, could not be fitted into any accepted classifications when they first arose, but nevertheless have been held to be torts. The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.

Prosser, The Law of Torts, pages 3-4 (3rd Ed. 1964).

I would reverse the judgment of dismissal and remand this case for further proceedings.

Andrew Jackson Higgins, Judge

"APPENDIX B"

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MOTION FOR REHEARING BEFORE THE SUPREME COURT OF MISSOURI

COME NOW appellants and move the court for rehearing in the above cause on the following grounds:

1. THE COURT IN ITS OPINION OVERLOOKED THE OVERWHELMING WEIGHT OF AUTHORITY IN THE UNITED STATES AND THEREBY HAS CREATED INCONSISTENCIES IN THE LAW OF MISSOURI.

The majority relies on the dissent in the 1978 New York case of *Becker v. Schwartz*, 413 N.Y.2d 815 in refusing to recognize appellants' causes of action. *Becker v. Schwartz, supra*, by a five to two majority in fact recognized the action of wrongful birth and is in accord with the majority view, now numbering 18 states, recognizing

said action. (Appellants' brief, p.p. 19-20). The District of Columbia has just adopted the majority view in the United States; *Haymon v. Wilkerson,* 535 A.2d 880 (D.C. Ct. App. 1987). See also, Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment,* 100 Harv. L. Rev. 2017 (1987) at p. 2033:

> "The wrongful birth action, however, is limited —as are all malpractice claims—to situations in which there has been a violation of the duty of a physician to provide the accepted standard of competent medical care."

The dissent in *Becker* has been accorded no recognition and has been followed by no other court, save now Missouri. Respondent's in their brief were able to cite only one minority opinion; (respondent's brief, p. 9) to support their position which this court has now adopted as the law of Missouri.

Judge Welliver, at p. 10 of the court's opinion states that the court has found no cases which effectively deal with the problems of causation raised by the dissent in the *Becker* case.

New Jersey Supreme Court Justice Pollock speaking for the majority in the 1984 case of *Procanik v. Cillo,* 478 A.2d 755 (N.J. 1984) answers the *Becker* dissent at page 769 where it is observed:

> "A court or jury, in cases such as these, is not called on to make its own judgment or to be guided by its own subjective moral values as to whether the child should have been born. The metaphysical dilemma of comparing existence with nonexistence is not presented and does not have to be resolved in

determining whether a familial tort has been committed. That tort is the preemption of expectant parents from any choice as to their child's fate. The right of parents to decide whether they should bear a particular child is at stake, not judicial recognition that a certain life is worth living."

Any concerns regarding difficulty of calculating damages are addressed in Note, 100 Harv. L. Rev., *supra*, at 2021:

"Today, courts view the argument that damages cannot be measured in wrongful birth actions as in reality, a thinly-disguised policy argument against reproductive autonomy that has lost [its] potency.

Advances in the fields of prenatal screening and diagnosis have led courts to interpret the applicable standard of care as requiring appropriate tests and counseling for women at risk of bearing children with birth defects. Thus, the courts have held that general principles of tort law requires that the physician who negligently deprives a mother of the choice whether to continue pregnancy when fetal defects are present make amends for the damages which he has proximately caused."

There is also an excellent guideline for calculation of damages set forth in *Phillips v. United States*, 575 F. Supp. (D.C. S.C. 1983). The court in that case had no difficulty in calculating damages for economic loss and emotional distress totaling One Million Five Hundred Thirty-Three Thousand ($1,533,000.00) Dollars for a Downs' Syndrome afflicted child observing at page 1315:

"The jurisdictions that have considered wrongful birth claims are currently unanimous in their allow-

ance of damages for the parents' economic and pecuniary loss. . ."

See also, Note, *A Preference for Nonexistence, Wrongful Life and a Proposed Tort of Genetic Malpractice*, 55 S. Cal. L. Rev. 477, 501 (1982).

As the majority opinion admits at p. 4:

> "Denying the motion for rehearing or transfer, we did permit a suit for "wrongful conception" to stand in *Miller v. Duhart*, 637, S.W.2d 183 (Mo. App. 1982)."

The *Miller* case, *supra* held at p. 197:

> "Wrongful birth is nothing more than a descriptive label applied to a particular type of malpractice or negligence action."

The fact that Missouri has already recognized the "wrongful conception" tort for medical negligence has not gone unnoticed by legal scholars at St. Louis University and the University of Missouri at Kansas City. See, *Law of Medical Malpractice In Missouri*, 28 St. Louis University L. Journal 397, 422 (1984); *Plaintiff's Rights and Malpractice*, 53 U.M.K.C. L. Review 26 (1984).

By this court's present ruling Missouri now recognizes the medical negligence tort of "wrongful conception", but denies the medical negligence tort of "wrongful birth", the only distinguishable difference being that the first tort is caused by medical misfeasance and the second by medical malfeasance. The court's ruling creates a distinction without a difference, and creates just the legal quagmire which Justice Robertson cautions the court to avoid in his concurring opinion.

2. THE COURT IMPROPERLY BASED ITS OPINION UPON AREAS OF REVIEW WHICH SHOULD NOT HAVE BEEN CONSIDERED.

The court went beyond the permissible scope of review and based its decision upon collateral matters not properly subject to review.

Upon considering a motion to dismiss under *Aiken v. Cleary*, 396 S.W.2d 668 (Mo. 1965) the facts as alleged in appellant's petition must be taken as true and those facts constitute medical negligence. Just because the damages may be difficult to prove does not defeat the cause of action. *Ohlensdorf v. Feinstein*, 670 S.W.2d 930 (Mo. App. 1984). *Roe v. Wade*, and the abortion issue have nothing to do with this case for it involves only a claim for medical negligence; the facts pleaded being true for the purposes of the motion, the causes should not have been dismissed.

3. THE COURT IMPROPERLY DEPRIVED APPELLANTS OF SUFFICIENT TIME WITHIN WHICH TO PRESENT ORAL ARGUMENT.

In the interest of fundamental fairness the appellants feel compelled to present a final point on the court's *sua sponte* reduction of time for oral argument of this case of first impression.

On January 6, 1988, the court advised appellants of a reduction of argument time to 15 minutes. (Copy attached as Exhibit "A"). On January 15, 1988, appellants appealed to the court for the 40 minutes normally allowed for argument by Rule 84.12 (Exhibit "B"). This request was denied on January 15, 1988. (Copy attached as Exhibit "C").

Fundamental fairness cries out in this case to be recognized by affording to the appellants case sufficient importance to allow adequate time for oral argument.

Due to the abbreviated time allocated appellants were regrettably unable to reach, much less fully develop arguments which would have addressed the reasoning of the majority concerning causation and damages. Due to the number of relative and important issues presented by this appeal Appellants' counsel was forced to pick, choose, and selectively anticipate those arguments which the court might deem relevant and important and which time allowed to argue. This had a chilling effect on Appellant's ability to present meaningful argument to the court.

If the court can see fit to allow appellants no more than 15 minutes to present argument on a case of such importance, then justice is not served. Rehearing should be granted to allow sufficient time for presentation to the high court justification for Missouri to recognize these causes of action.

CONCLUSION

The court by allowing the result of the majority to stand is saying that the overruling of respondent's motion to dismiss by the trial court in 1985 was in error since no common law action for "wrongful birth" or "life" existed in Missouri; the 1986 statute Section 188.130 R.S.Mo. therefore being useless as it denied a claim for a cause of action that was not recognized. The result of this decision is to allow recovery in the *Miller v. Duhart, supra,* situation, i.e., "wrongful conception" but deny a Missouri citizens recovery for "wrongful birth" or "wrongful life."

Such differentiation creates an inconsistency of law, the constitutional implications of which should not be allowed to stand.

Respectfully submitted,

/s/ William T. Bernard
William T. Bernard (18706)
1711 Westport Road
Kansas City, MO 64111
(816) 756-3737
Attorney for Plaintiffs-Appellants

I hereby certify that a copy of the foregoing was mailed postage prepaid on this 28 day of April, 1988, to:

Harold Fridkin
Charles H. Stitt
Suite 1710
1126 Grand Avenue
Kansas City, MO 64106

/s/ William T. Bernard
William T. Bernard

EXHIBIT "A"

CLERK OF THE SUPREME COURT
State of Missouri
Post Office Box 150
Jefferson City, Missouri
65102

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

January 6, 1988

Mr. William T. Bernard
1711 Westport Road
Kansas City, Missouri 64111

Mr. Thomas Wagstaff
2480 Pershing Road
Kansas City, Missouri 64141

Re: Robert Wilson, et al. vs. Donald R. Kuenzi, M.D., et al.
No. 69592; Oral Argument Date: January 20, 1988

Dear Counsel:

After examination of the briefs the Court believes that the issues in this case may be adequately presented if the side of the appellant is allowed not to exceed 15 minutes for argument and the side of the respondent is allowed not to exceed 15 minutes. The appellant may reserve not to exceed 4 minutes of the allocated time for rebuttal. If the time allocated for the principal argument is exceeded, the rebuttal time will be reduced accordingly. Your attention is directed to Rule 84.12.

Two or more attorneys arguing on the same side are obliged to agree upon division of the time. If one attorney exceeds the allocated time, the time reserved for others will be reduced.

The Court will consider suggestions that the allotted time is inadequate. Suggestions should be communicated to the Clerk's Office immediately, and opposing counsel notified.

Yours very truly,

Thomas F. Simon
/s/ Susan Bodamer
Deputy Clerk, Court en Banc

cc: Harold L. Fridkin & Charles H. Stitt

EXHIBIT "B"

(Filed January 15, 1988)

NO. 69592

IN THE
SUPREME COURT OF THE
STATE OF MISSOURI

ROBERT WILSON, et al.,
APPELLANTS

vs.

DONALD E. KUENZI, M.D., et al.,
RESPONDENTS

APPEAL FROM THE CIRCUIT COURT OF JACKSON
COUNTY, MISSOURI, DIVISION "2"
HONORABLE WILLIAM W. ELY, JUDGE

APPELLANTS APPLICATION FOR ADDITIONAL TIME FOR ORAL ARGUMENT WITH SUGGESTIONS

By notice of January 6, 1988, the clerk of the court notified counsel for appellants that he had been allotted 15 minutes for oral argument including time for rebuttal.

For good cause set forth herein appellants pray the court to exercise its discretion as provided by Rule 84.12 of the Court's Rules and allow appellants 40 minutes to present oral argument.

The argument to be presented to the court involves constitutional issues on both the state and federal levels pertaining to the validity of Section 188.130 R.S.Mo. It is not feasible to present adequate or meaningful argument in the time period of 15 minutes.

A review of appellants' briefs discloses that some 65 case authorities have been cited in support of appellants position as well as Missouri Law Review Articles.

A broad overview of the issues to be addressed during oral argument is as follows:

1. Does the statute retroactively extinguish vested rights which topic involves the argument of constitutional issues?

2. Does the statute improperly burden a woman's constitutional right of privacy in the area of decisions regarding abortion? This topic requires an extensive review of constitutional authority and discussion of constitutional issues connected therewith.

3. Does the statute establish classifications which unnecessarily burden fundamental interests protected by the Constitution? Constitutional equal protection issues must be discussed in connection with this issue.

4. Does the statute violate the mandate of the Missouri Constitution guaranteeing a remedy for every injury to person, property or character? Discussion and interpretation of the Missouri Constitution is necessary to determine this issue.

5. Do public policy anti-abortion sentiments constitute sufficient grounds to justify the enactment and continued enforcement of the statute in question when balanced against constitutional guarantees? This is an issue raised by respondents in their brief and requires analysis and discussion of federal case law which has considered similar issues.

6. Should the court exercise the power with which it is vested as an architect of the common law to recognize appellants causes of action in the event the court deems them not heretofore established?

There are additional issues raised by both appellants' and respondents' briefs which will not take the amount of time as the major points set forth herein, but nonetheless must also be addressed.

The issues presented in the instant appeal are important and address fundamental areas of rights and responsibilities between the state and its citizens. The importance of these issues calls for an adequate and thorough presentation of the authority and theory in support thereof to the court. This cannot be accomplished in 15 minutes.

WHEREFORE appellants pray the court grant to them the maximum time provided under the rules to present oral argument.

/s/ William T. Bernard
William T. Bernard
1711 Westport Road
Kansas City, MO 64111
(816) 756-3737
Attorney for Appellants

I hereby certify that a copy of the foregoing was mailed postage prepaid on this 12 day of January, 1988, to:

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1126 Grand Avenue
Kansas City, MO 64106

/s/ William T. Bernard
William T. Bernard

"APPENDIX C"

(Filed May 3, 1985)

IN THE
CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI

Case No. CV 85-03138
Civil B

ROBERT WILSON
and
BARBARA AND CARL WILSON,
Plaintiffs,
vs.
DONALD E. KUENZI, M.D., et al.,
Defendants.

FIRST AMENDED PETITION FOR DAMAGES - MINORS CLAIM

COUNT I

COMES NOW Plaintiff Robert Wilson, a minor, by and through his mother and next friend, Barbara Wilson, and by and through his attorney, and for his cause of action against the Defendants under Count I alleges and states as follows:

1. That Plaintiff, Robert Wilson, and his next friend are residents of Kansas City, Jackson County, Missouri and that the Defendant Donald E. Kuenzi, M.D. is and was at all times mentioned herein a health care provider being

a licensed physician in the practice of medicine representing and holding himself out to the public and in particular to Plaintiff's mother, Barbara Wilson, as a specialist in the area of obstetrics and family practice, and maintaining an office at 8630 North Oak Street Trafficway, Kansas City, Clay County, Missouri, and that Defendant, Kuenzi, Hayes, Kirkland, Wilson, M.D.'s, Inc. (hereinafter referred to as Defendant KHKW) is a Missouri Corporation duly organized and existing under the laws of the State of Missouri, and subject to service of process upon its registered agent in Kansas City, Jackson County, Missouri, and at all times mentioned herein held itself out to the public as a provider of health care services including care and treatment in return for consideration paid, and therefore the Defendant was at all times mentioned herein in the business of selling medical services.

2. That at all times mentioned herein Defendant Donald E. Kuenzi, M.D., was acting as the agent, servant and employee of Defendant KHKW, and at all times complained of herein was acting within the course and scope of his agency and employment with Defendant KHKW.

3. That during the period of Plaintiff Barbara Wilson's pregnancy and the period of gestation of Robert Wilson, Plaintiff's parents relied upon the expertise of Defendants to monitor said gestation and to conduct those tests readily available, desirable and reasonably necessary to monitor the development of the fetus to determine its health and well being.

4. That in the course of attending Plaintiff Barbara Wilson's pregnancy Defendants failed to provide the requisite skill and care required of them in their respective field of medicine and by said failure caused Plaintiff Robert

Wilson to be born a severely and permanently disabled baby suffering multiple birth defects, and in particular to be born with "Down's Syndrome".

5. That Defendants were guilty of the following acts of negligence and carelessness in failing to measure up to the standards of due care, skill and practice required and observed by specialists in the field of obstetrics and family practice in the medical community in which they practiced to wit:

(a) In failing to offer or perform adequate genetic testing upon Plaintiff Barbara Wilson and Robert Wilson during the period of Robert Wilson's gestation;

(b) In failing to offer or perform the test of amniocentesis upon Plaintiffs Barbara Wilson and Robert Wilson during the period of Robert Wilson's gestation;

(c) In failing to offer or provide to Plaintiff's parents Barbara and Carl Wilson genetic counseling;

(d) In failing to refer Plaintiff's parents, Barbara and Carl Wilson to a specialist in genetic counseling for advice, counsel and testing;

(e) In failing to advise and warn Plaintiff's mother Barbara Wilson that due to her advanced age she was statistically an "at risk" patient to give birth to Plaintiff as a "Down's Syndrome" child;

(f) In failing to disclose pertinent facts and provide to Plaintiff's parents, Barbara and Carl Wilson genetic testing results so that they could consider the option of legally terminating Plaintiff Barbara Wilson's pregnancy by means of abortion;

(g) Defendants were otherwise negligent in failing to measure up to the requisite standard of due care observed and required by duly licensed physicians and health care providers and further particulars presently unknown to Plaintiffs but which are verily believed and alleged will be disclosed upon proper discovery procedure in the course of the instant litigation.

6. That in failing to be adequately advised in the area of genetic counseling and to have the benefit of genetic counseling and testing Plaintiff's mother Barbara Wilson's pregnancy was allowed to be carried to term which resulted in the birth of Robert Wilson on June 23, 1983, suffering from the impairment of "Down's Syndrome".

7. That as a direct and proximate result of the negligence and carelessness of the Defendants, Plaintiff Robert Wilson was born with permanent and progressive birth defects including "Down's Syndrome" and that by reason of such birth defects shall live the balance of his life with a permanent impairment; that his ability to learn and become educated and care for himself has been detrimentally affected and that as a result thereof Plaintiff will be required to expend extraordinary sums of money for specialized schooling and application of specialized educational techniques to compensate for his deficiency in learning capabilities and his diminished intelligence due to his infirmity, that Plaintiff Robert Wilson is now permanently and totally disabled now requiring considerable sums of money for clinical, medical, remedial, therapeutic and special custodial care and will continue to require extraordinary expenditures for same

in the future, the amounts of which Plaintiff is unable to state at the present time but that such sums of money present and future in total amounts will be of great proportions.

8. That as a result of the permanent injuries that Plaintiff Robert Wilson has sustained and will sustain in the future, he has suffered substantial and irreparable damage.

WHEREFORE, under the allegations of Count I Plaintiff Robert Wilson prays judgment against the Defendant and each of them for such damages as are fair and reasonable together with his costs herein incurred and expended.

MINOR'S PARENTS CLAIM

COUNT II

COMES NOW Plaintiffs Robert and Carol Wilson and for their cause of action against the Defendants under Count II allege and state as follows:

1. Incorporate herein by reference thereto as though specifically set forth herein the allegations and averments of Paragraph Nos. 1, 2, 3, 4, 5 and 6 of Count I hereinabove.

2. Pleading further, Plaintiffs state due to Defendant's negligently and carelessly failing to properly advise Plaintiff Barbara Wilson as to the availability and desirability of having amniocentesis performed and regarding the availability of genetic counseling, Plaintiff Barbara Wilson having inadequate advise and counsel,

did not have amniocentesis performed which would have revealed that her fetus had "Down's Syndrome" and that if she had been aware of that fact, she would have legally terminated her pregnancy by having an abortion.

3. That as a direct and proximate result of the carelessness and negligence of the Defendants, Plaintiffs' son Robert Wilson was born with permanent and progressive birth defects including "Down's Syndrome", and that by reason of such birth defects shall live the balance of his life with a permanent impairment, and that as a direct result thereof Plaintiff's state that they have been required to expend, and will be required to expend in the future for an indefinite period of time to come sums of money for clinical, medical, remedial, therapeutic, and special educational and educational and custodial care which would not have been required if Robert Wilson had been born without the aforesaid birth defects, the amounts of which Plaintiffs are unable to state with certainty at this time, but that such sums of money present and future will be of great proportions and that Plaintiffs will be required to provide total or partial support to their son Robert beyond the normal age when he would become self supporting because of his contemplated inability to be self supporting and earn a livelihood, and that Plaintiffs will be deprived of the full companionship and services of their child, and that they have suffered and will continue to suffer severe mental anguish and distress as the result of the birth of their child with "Down's Syndrome."

4. That as a result of the conditions complained of Plaintiffs have sustained and will sustain in the future substantial damages.

WHEREFORE, under the allegations of Count II, Plaintiffs Barbara and Carl Wilson pray judgment against the Defendants and each of them for such damages as are fair and reasonable together with their costs herein incurred and expended.

Respectfully Submitted,

Bernard, Gatrost, Rice &
Di Cavalcante
By /s/ William T. Bernard
William T. Bernard (18706)
4733 Belleview
Kansas City, Missouri 64112
816/756-3737

I hereby certify that a copy of the foregoing was mailed this 3 day of May, 1985 to:

Thomas W. Wagstaff
James D. Conkright
Blackwell Sanders Matheny et al
Five Crown Center, Suite 600
2480 Pershing Road
Kansas City, Missouri 64108

"APPENDIX D"

188.130. No cause of action for wrongful life

1. No person shall maintain a cause of action or receive an award of damages on behalf of himself or herself based on the claim that but for the negligent conduct of another, he or she would have been aborted.

2. No person shall maintain a cause of action or receive an award of damages based on the claim that but for the negligent conduct of another, a child would have been aborted.

(L.1986, H.B. No. 1596, § A.)

"APPENDIX E"

[9]*

POINTS RELIED ON AND AUTHORITIES

POINT I

THE TRIAL COURT ERRED IN SUSTAINING RESPONDENT'S MOTION TO DISMISS APPELLANTS' FIRST AMENDED PETITION BECAUSE SECTION 188.130 R.S.Mo. 1986, WHICH THE COURT RELIED ON, VIOLATES A WOMAN'S RIGHT TO CHOOSE AN ABORTION ESTABLISHED BY *ROE* v. *WADE*, 410 U.S. 113 (1973); IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT; IMPERMISSIBLY BURDENS THE CONSTITUTIONALLY PROTECTED RIGHT TO PRIVACY AND IS NOT JUSTIFIED BY A COMPELLING STATE INTEREST.

CASES:

Roe v. Wade, 410 U.S. 113 (1973)

Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976)

Carey v. Population Services International, 431 U.S. 678 (1977)

Phillips v. United States, 658 F.2d 471 (7th Cir. 1981)

Miller v. Duhart, 637 S.W. 2d 183 (Mo. App. 1982)

Robak v. United States, 658 F.2d 471 (7th Cir. 1981)

Andalon v. Superior Court, 208 Cal. Rptr. 899 (CA. 1984)

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*Number in brackets represents original page number of Petitioner's Supreme Court Brief.

Moores v. Lucas, 465 So.2d 1022 (Fla. 1981)
Blake v. Cruz, 698 P.2d 315 (Id. 1984)
Goldberg v. Ruskin, 471 N.E.2d 530 (Ill. 1984)
Eisenbrenner v. Stanley, 308 N.W.2d 209 (Mich. 1981)
Smith v. Cote, 513 A.2d 341 (N.H. 1986)
Berman v. Allen, 404 A.2d 8 (N.J. 1979)
Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978)
Gallagher v. Duke Univ., 638 F.Supp. 979 (M.D.N.C. 1986)

* * *

[12]

POINT II

THE TRIAL COURT ERRED IN SUSTAINING RESPONDENT'S MOTION TO DISMISS APPELLANTS' FIRST AMENDED PETITION BECAUSE SECTION 180.130 R.S.Mo. 1986, WHICH THE COURT RELIED ON, VIOLATES CONSTITUTIONAL GUARANTEES OF THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION BECAUSE IT RELIES UPON CLASSIFICATIONS THAT BURDEN A FUNDAMENTAL INTEREST; NOT BEING JUSTIFIED BY A COMPELLING STATE INTEREST AND NOT JUSTIFIABLE AS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL PURPOSE.

CASES:

Eisenstadt v. Baird, 405 U.S. 438 (1972)

Gallagher v. Duke University, 638 F.Supp. 979 (M.D.N.C. 1986)

STATUTES:

United States Constitution, Fourteenth Amendment

Section 188.130 R.S.Mo. (1986)

LAW REVIEW ARTICLES:

Wrongful Birth Actions: The Case Against Legislative Curtailment, 100 Harvard L. Review, Number 8 (June 1987)

* * *

[17]

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN SUSTAINING RESPONDENT'S MOTION TO DISMISS APPELLANTS' FIRST AMENDED PETITION BECAUSE SECTION 188.120 R.S.Mo. 1986, WHICH THE COURT RELIED ON, VIOLATES A WOMAN'S RIGHT TO CHOOSE AN ABORTION ESTABLISHED BY *ROE* v. *WADE,* 410 U.S. 113 (1973); IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT; IMPERMISSIBLY BURDENS THE CONSTITUTIONALLY PROTECTED RIGHT TO PRIVACY AND IS NOT JUSTIFIED BY A COMPELLING STATE INTEREST.

The issue which confronts the court in the instant appeal is not a new or novel one. It is the issue of the right of a woman to make the most personal decision of terminating her pregnancy free of governmental intrusion and the right of privacy associated with her decision. It is an issue which finds well-meaning people of conviction espousing opposing viewpoints. See *Roe v. Wade,* 410 U.S. 113 (1973) at 116. The abortion controversy involves ethical, moral, spiritual and theological considerations. However, as a court of law, this honorable court must focus its decision on the legal issues raised by the instant suit and the Missouri statute in question and base its decision on constitutional principles as they have been defined and interpreted by the Supreme Court of the United States.

Since 1973 the cornerstone of any analysis of the right of a woman to terminate her pregnancy has been the

Supreme Court's landmark decision in *Roe v. Wade, supra.* That case and its [18] progeny dealing with abortion which have followed it provide a framework for determining the constitutional issues raised by the respondent's Motion to Dismiss; trial court's action sustaining same, and the instant appeal.

A reading of those cases, and in particular their characterization of the nature of a woman's right to an abortion clearly shows that Section 188.130 R.S.Mo. 1986 is unconstitutional in that it invades a woman's right to privacy in violation of Fourteenth Amendment protections.

In 1973, the Supreme Court in *Roe v. Wade, supra,* held that a woman has a constitutionally protected right to decide without intrusion by the government, whether to terminate her pregnancy. Since *Roe* anti-abortion groups have continuously attempted to restrict that right through intensified lobbying efforts of state legislatures. The statute under review in the instant case was enacted as a result of the lobbying efforts of the Missouri Catholic Council and Missouri Citizens for Life. *See, Wrongful Birth Actions: The Case Against Legislative Curtailment,* 100 Harvard L. Review Number 8, 2017, (June 1987). Through their efforts they have succeeded in enlisting the support of the Missouri legislature in abolishing tort actions brought by parents who allege that a health-care professional negligently interfered with their right to decide whether to have an abortion.

Medical malpractice actions brought on behalf of the parents of a child allege that but for the negligence of a treating physician, they would have terminated the pregnancy. This is the [19] type of lawsuit being brought by Barbara and Carl Wilson and is commonly termed a "wrongful birth" action.

Medical malpractice actions brought on behalf of a child, allege in essence, that but for the negligence of a physician, he or she would have been aborted. This is the type of lawsuit being brought by Robert Wilson, a minor, and is commonly termed a "wrongful life" action.

It is the causes of action of "wrongful birth" and "wrongful life" that Section 188.130 R.S.Mo. 1986, was enacted to eliminate retroactively.

Finally, there is a third category of action commonly referred to as "wrongful conception," but often not specifically distinguished from "wrongful birth," which consists of a claim by a parent that but for the negligence of a physician (typically failure to perform a contraceptive or sterilization procedure properly) she would not have conceived a child who is subsequently born. This cause of action has been specifically recognized as a common law right of action by the Missouri Court of Appeals, Eastern District in *Miller v. Duhart*, 637 S.W.2d 183 (1982). In recognizing the cause of action the court stated at 187:

> "Wrongful birth is nothing more than a descriptive label applied to a particular type of malpractice or negligence action. Thus, before damages can be awarded the siblings are required to demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the injuries claimed. See, Restatement (Second) of Torts, Section 281."

A significant number of courts since *Roe*, 17 in all, have considered the validity of a wrongful birth cause of action and have upheld same. *See, e.g.,*:

> [20] Alabama, see Robak v. United States, 658 F.2d 471 (7th Cir. 1981); California, see Andalon v. Superior Court, 162 Cal. App. 3d 600, 208 Cal. Rptr.

899 (1984); Florida, see Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981); Idaho, see Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984); Illinois, see Goldberg v. Ruskin, 128 Ill. App. 3d 1029, 471 N.E. 2d 530 (1984), aff'd, 113 Ill. 2d 482, 499 N.E. 2d 406 (1986); Michigan, see Eisbrenner v. Stanley, 106 Mich. App. 351, 308 N.W. 2d 209 (1981); New Hampshire, see Smith v. Cote, 128 N.H. 231, 513 A. 2d 341 (1986); New Jersey, see Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); New York, see Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 815 (1978); North Carolina, see Gallagher v. Duke Univ., 638 F. Supp. 979 (M.D.N.C. 1986); Pennsylvania, see Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D.Pa. 1978); South Carolina, see Phillips v. United States, 508 F. Supp. 544 (D. S.C. 1981); Texas, see Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Virginia, see Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982); Washington, see Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983), aff'd, 746 F.2d 517 (9th Cir. 1984); West Virginia, see Jennifer S. v. Kirdnual, 332 S.E. 2d 872 (W.Va. 1985); and Wisconsin, see Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975). Only one court has found the action invalid in a case decided after Roe. See Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985).

But see Gallagher, 638 F. Supp. 979 (limiting the holding in Azzolino to wrongful birth claims involving postconception misconduct). One state, Maine, has legislatively recognized a cause of action for wrongful birth. See ME. Rev. Stat. Ann. tit. 24 Section 2931(2) (1986).

Respondents argue that appellant's causes of action did not exist under the common laws of Missouri and therefore can be extinguished with impunity by the legislature, even retroactively. This position begs the question: if causes of action for "wrongful birth" and "wrongful life" do not exist why is it then necessary for the legislature to statutorily extinguish that which never existed in the first place?

The action of "wrongful birth" is in form no different than any other type of malpractice action and constitutes a logical extension of the law into an area in which developing technology and medical advances have created novel situations where the negligence of a physician may result in injury to his patient.

[21] Given the consistency with which other jurisdictions have recognized the cause of action of "wrongful birth" by judicial decision appellant's have no doubt that, absent the prohibitions of Section 188.130 R.S.Mo. 1986, a common law cause of action would be recognized in Missouri. Indeed, the trial court before the enactment of the statute in question recognized the appellant's causes of action in overruling respondent's Motion to Dismiss. (Legal file p. 13).

The policy considerations typically cited by the courts as weighing in favor of a "wrongful birth" cause of action are compelling as a review of the cited cases will disclose.

While not as universally recognized as "wrongful birth", "wrongful life" actions have been recognized in the following jurisdictions. *See, e.g.,*:

> Becker v. Schwartz, 46 N.Y. 2d 401, 412, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 901 (1978); accord

Bruggeman v. Schimke, 239 Kan. 245, 718 P.2d 635 (1986) (listing courts that have refused to recognize a wrongful life cause of action). Four states have recognized an action for wrongful life California, see Turpin v. Sortini, 31 Cal. 3d 220, 643, P. 2d 954, 182 Cal. Rptr. 337 (1982); Colorado, See Continental Casualty Co. v. Empire Casualty Co., 713 P. 2d 384 (Colo. App. 1986); New Jersey, see Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Washington, see see Harbeson v. Parke-Davis, Inc., 98 Wash.2d 460, 656 P.2d 483 (1983), aff'd, 746 F. 2d 517 (9th Cir. 1984).

Roe established a woman's right to an abortion as a right of privacy founded in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments as well as in the penumbra of the Bill of Rights, *410 U.S. at 152.* Although the limits of the right of privacy are not rigidly defined, the Court stated that:

> "this right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id*, at 153.

[22] The court, however, did not consider this privacy right to be absolute. Even though this was a fundamental right, the state could interfere with the right, *but only* (emphasis added) in order to further a compelling state interest. Only two such state interests were identified in *Roe v. Wade* or have been judicially recognized since that decision. First was the states interest in safeguarding the health of the mother and in maintaining medical standards, and second, was its interest in protecting the potentiality of human life. The court further held that the first interest did not become compelling

until the end of the first trimester of pregnancy and the second interest only became compelling at the point of fetal viability.

In order to determine whether state legislation affecting a woman's abortion right is unconstitutional on substantive due process grounds, a court must first ascertain whether the effect of the legislation is to unduly burden a woman's fundamental right to seek an abortion. *See, Maher v. Roe,* 432 U.S. 464 (1977); *Belotti v. Baird,* 428 U.S. 132 (1976). If the legislation does burden that right, it can only be justified if it furthers a compelling state interest. As the Court said in *Carey v. Population Services International,* 431 U.S. 678, 686 (1977):

> ". . . where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interest, and must be narrowly drawn to express only those interests."

The first question then to be resolved in the instant cause is whether Section 188.130 R.S.Mo. 1986 interferes with or burdens a woman's decision making process regarding abortion. If [23] it does then the states action in enacting said legislation is unconstitutional unless saved by the compelling state interest test.

Initially, it is crucial to note that the right which is at stake here is not simply a woman's right to an abortion. Rather, as *Roe v. Wade* and its progeny make clear, it is a woman's right to decide whether or not she should have an abortion. The Supreme Court abortion cases leave no doubt that a woman's abortion rights are included in a right of personal privacy founded upon an individual's interest in independence in making certain kinds of im-

portant decisions. *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *see also, Carey, supra* at 684. In *City of Akron v. Akron Center for Reprod. Health,* 103 S.Ct. 2481 (1983) the court at 2491 characterized this right of privacy in the abortion context thusly:

> "Central among these protected liberties is an individual's freedom of personal choice in matters of marriage and family". (quoting J. Stewart concurring in *Roe v. Wade*, 410 U.S. at 169).

It is thus a freedom from governmental interference in a woman's decision whether or not to terminate her pregnancy which was established as a fundamental right in *Roe v. Wade.* See p. 154 where the court stated:

> "We, therefore, conclude that the right of personal privacy includes the abortion *decision* . . . (emphasis added)."

This principal has been repeatedly reiterated by the Supreme Court. *See, e.g., Planned Parenthood of Cent. Mo. v. Danforth,* 428 U.S. 52 (1976) at 66:

> "It is true that *Doe v. Bolton,* 410 U.S. 179 and *Roe v. Wade* clearly establish that the State may not restrict the *decision* of the patient and her physician regarding abortion during the first stage of pregnancy."

[24] Indeed, it is axiomatic that the right to obtain an abortion is meaningless unless such a right can be exercised freely and intelligently, with a full awareness of its implications. *See also, e.g., Bellotti v. Baird, supra,* invalidating parental consent statute as unconstitutionally infringing pregnant minors rights under *Roe.*

The Supreme Court has also made it clear that the decision whether to exercise that right:

> ". . . in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician." *Roe v. Wade* at 167.

For that reason the Supreme Court in *Roe v. Wade*:

> ". . . stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion and in determining how an abortion was to be carried out." *Colautti v. Franklin*, 439 U.S. 379 (1979) at 387.

The crucial nature of the physician's role in a woman's decision whether or not to terminate her pregnancy is a recurrent theme in the Court's opinions dealing with abortion. *See, e.g., City of Akron* at 2491:

> "The Court also has recognized, because abortion is a medical procedure, that the full vindication of the woman's fundamental right necessarily requires that her physician be given the room he needs to make his best medical judgment." *Danforth, supra.*

The Supreme Court has considered state statutes imposing regulations infringing upon the right to choose to have an abortion holding that the state may not interfere with the doctor-patient consultation necessary for the meaningful exercise of a woman's decision whether or not to terminate her pregnancy. In *City of Akron, supra,* the court invalidated an Ohio ordinance that specified a litany of information that the physician must [25] recite to each woman seeking an abortion. The court found that the ordinance unconstitutionally interfered with the normal functioning of the doctor-patient relationship by requiring the doctor to provide information to a woman regardless of whether it was medically indicated or rele-

vant to her decision. So also in the case of *Thornburgh v. American College of Obstetricians*, 106 S. Ct. 2169 (1986) the court struck down a similar provision of a Pennsylvania ordinance because it placed the physician in an awkward position and infringed upon his or her professional responsibilities.

Although state legislatures may enjoy wide latitude in regulating tort actions, in doing so they may not impermissibly interfere with rights implicitly or explicitly protected by the Constitution of the United States. *See, e.g., Munn v. Illinois*, 94 U.S. 113, 134 (1877); *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 13 (Minn. 1986); Note, *A Remedy For All Injuries?* Chi-Kent L. Rev. 90, 94 NN. 29, 30 (1974).

It is appellants position that Section 188.130 R.S.Mo. 1986 is unconstitutional because it violates the due process clause of the Fourteenth Amendment because it impermissibly burdens the constitutionally protected right of privacy and is not justified by a compelling state interest.

Impleat in the due process clause of the Fourteenth Amendment is the right to freedom of personal choice in matters of family life. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977). The Supreme Court has recognized that a woman is entitled to rely on her doctor for advice in connection with her [26] decision whether to have an abortion *Roe, supra* at 153, *Carey, supra* at 685. By allowing the Missouri statute to stand the court will be licensing doctors to withhold information regarding a woman's risk of bearing a child with birth defects, thereby allowing the state to intrude impermissibly into the physician-patient consultation and thereby undermine the essential reliance a woman places in her doctor.

Section 188.130 R.S.Mo. 1986 directly interferes with the procreative decision making process protected by the Constitution. Legislation prohibiting "wrongful birth" actions similarly interferes with the normal functioning of the doctor-patient consultation and infringes the physician's professional responsibilties.

Clearly, by prohibiting a malpractice action, the statute in question removes a powerful check on the conduct of the attending physician, the individual upon whom the woman is entitled to rely for *full* advice in connection with her pregnancy. The statute eliminates a significant disincentive for a physician to exercise anything less than due care in informing the patient of her options with respect to abortion. The dangers of such a situation are readily apparent. Prohibition of the malpractice remedy strips the physician's duty to inform his patient of meaning. In the presence of such a statute, many doctors will continue to exercise proper medical judgment in accordance with accepted standards of care; but others relieved of the threat of malpractice suits will not. *See Bell, Legislative Intrusion Into The Common Law of Medical Malpractice: Thoughts About the* [27] *Deterrent Effect of Tort Liability,* 35 Syracuse L. Rev. 939, 966-68 (1984); *Wrongful Birth Actions: The Case Against Legislative Curtailment, supra.*

The Supreme Court in *Roe, supra,* recognized the importance of the patient's access to the courts for the purpose of instituting medical malpractice actions as a check on the physicians duty to inform when it is observed at 166:

> "If an individual practitioner abuse the privilege of exercising proper medical judgment the usual rem-

edies, judicial and intra-professional, would be available."

The possibility that a doctor will be held responsible for negligent conduct stands as a safeguard that the patient will be fully informed. Removal of the negligence action safeguard by legislative enactment while not actually preventing a woman from obtaining an abortion, does impede the complete exercise of a woman's rights under *Roe*, *supra*, and is a direct infringement on the informed decision making process as enunciated in *Roe*. This fact has been recognized by other jurisdictions when considering whether to impose liability for "wrongful birth." *See*, *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981); *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981), *Berman v. Allen*, 80 N.J. 421, 404 A.2d 8 (1979).

Additionally, removal of the fear of litigation from the mind of the treating physician may encourage an attitude among physicians, given the competitive and cost-conscious nature of the health care field today, of allowing considerations relating to the expense of a particular procedure (amniocentesis) to play too great a role in the physician's determination of the type of [28] care to be provided to a particular patient. Such a result, according to accepted theories of tort law is made less likely to occur due to the availability of a malpractice action on behalf of the patient. By removing that threat the statute upsets the balance which potential medical malpractice litigation strikes between the patient as a layperson and her physician as a specialist. It thereby unduly burdens her freedom of personal choice in this important matter and is therefore unconstitutional.

Section 188.130 R.S.Mo. 1986 eliminates any legal remedy to the pregnant patient who gives birth to a mentally retarded child as a result of the alleged malpractice of her physician. In every instance where there is a negligent failure to inform of risk, failure of genetic counseling or testing and a retarded offspring is born the patent's legal remedy is extinguished.

Without the threat to the physician of the patient's right to resort to the courts for redress of the physician's malpractice (failure to counsel and/or test), there is no incentive to any physician to ever discuss with his patient any medical information which would cause that patient to terminate a pregnancy if such choice would prove contrary to the physician's personal beliefs regarding abortion. This fact will deprive women of information from which they could exercise their freedom of choice. Many doctors do not favor abortion for moral and/or religious reasons and will only discuss genetic counseling or testing because of a fear of potential litigation should a mentally retarded child be born to the patient.

[29] The attitude toward abortion by certain members of the medical community including the respondent Donald Kuenzi in this case are clearly shown by statements made by said respondent during discovery. (Legal file pp. 86, 87 and 88).

The testimony clearly shows that the doctor's personal beliefs instead of sound medical judgments influenced opinions regarding abortion which in turn influenced his advice and treatment to his patient regardless of his professional obligation to conform his care and treatment to the highest appropriate standards of medical care. Further, his testimony reveals the instant suit was a cat-

alyst causing Dr. Kuenzi to cease delivery of babies in the future rather than conform his treatment to the appropriate standard of medical care requiring discussion of procedures with patients which might cause patients to elect to terminate their pregnancies. Enactment of the Missouri Statute now invites Dr. Kuenzi to resume his practice of failure to fully discuss and inform with impunity. Remove the fear of potential litigation which acts as an incentive to disclosure, and the patient will be left solely at the mercy of the indications of the doctor's personal conscience, philosophy, prejudices and beliefs as to what information is to be disclosed instead of receiving disclosures based upon the highest standards of medical care.

Such attitude among physicians as encouraged by the statute promotes malpractice contrary to the dictates of the American College of Obstetricians and Gynecologists. *See, The American College of Obstetricians and Gynecologists Standards for* [30] *Obstetric—Gynecologic Services*, pp. 98-99 (6th Ed. 1985) providing that: Purposefully withholding information that a patient wants to know, or needs to know in order to make an informed decision is patently unethical.

This statute promotes an attitude among physicians which encourages them to turn their backs on discussions of issues which might lead to elective abortions by their patients, promotes and encourages less than the exercise of the best medical judgment by physicians and encourages malpractice while at the same time removing any remedy for same.

The result can only be the birth of more and more mentally handicapped and retarded children to parents without the financial means to care for them, who must

of necessity turn to the state for financial aid and assistance, or attempt to meet the additional burden upon the family structure alone. Respondents will be hard pressed to show that such a result is in furtherance of a compelling state interest.

The United States District Court for South Carolina in recognizing a cause of action for "wrongful birth" in the case of *Phillips v. United States*, 508 F. Supp. 544 (U.S. D.C. 1981) agrees with appellants position at page 550:

> "At the very least, refusal to recognize this cause of action would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses which, if born, would suffer from genetic defects." *Berman v. Allan* 80 N.J. 421, 432, 404 A. 2d 8, 14 (1979) . . ."

And at page 551:

> "This court is also convinced that the relevant policy considerations, far from militating against the cause of action, actually support its recognition.

* * *

[34]

POINT II

THE TRIAL COURT ERRED IN SUSTAINING RESPONDENT'S MOTION TO DISMISS APPELLANTS' FIRST AMENDED PETITION BECAUSE SECTION 180.130 R.S.Mo., WHICH THE COURT RELIED ON, VIOLATES CONSTITUTIONAL GUARANTEES OF THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION BECAUSE IT RELIES UPON CLASSIFICATIONS THAT BURDEN A FUNDAMENTAL INTEREST; NOT BEING JUSTIFIED BY A COMPELLING STATE INTEREST AND NOT JUSTIFIABLE AS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL PURPOSE

Section 188.130 R.S.Mo. 1986 violates the equal protection clause of the Fourteenth Amendment because it relies on classifications that burden a fundamental interest and is not justified by a compelling state interest. Additionally, the classifications of the statute cannot be justified as rationally being related to a legitimate governmental purpose.

The Fourteenth Amendment to the United States Constitution provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has heretofore held that a classification which burdens abortion is subject to equal protection requirements. *See, Eisenstadt v. Baird*, 405 U.S. 438 (1972).

To meet equal protection guarantees a statute must apply uniformly to all those similarly situated, any differences being necessitated by a genuine and substantial

distinction, and must be enacted in pursuit of a legitimate purpose.

[35] The Missouri statute in question fails to meet any of the requirements necessary to satisfy Fourteenth Amendment guarantees of equal protection. As observed under Point I, *supra* there is no compelling state interest which is served by the statute in question.

The statute on its face sets up a distinction which is not genuine and substantial, resulting in unequal treatment of those similarly situated. The statute singles out for special application the group of parents making procreative decisions which involve abortion such as appellants. Under the statute only those parents who would have chosen abortion are precluded from suing their doctor when his negligent conduct interferes with their procreative autonomy.

If the Wilsons, out of concern for Mrs. Wilson's advanced age and the possibility she might give birth to a Down's syndrome child, had chosen to pursue sterilization or other medically induced birth control methods, and if such decision had been rendered void as a result of the negligence of their physician, resulting in the birth of Robert, a cause of action could be maintained under the terms of *Miller v. Duhart, supra*. Section 188.130 R.S.Mo. 1986 would be no bar to such a suit for malpractice negligence.

Physician negligence in the performance of a sterilization operation, and physician negligence in the information providing or testing field *prior to conception* is actionable under the Missouri statute if the fetus is allowed to be born.

The United States District Court for the Middle District of North Carolina held in 1986 that a "wrongful birth" action exists [36] for preconception negligence that induces a couple to conceive a defective child even when the state Supreme Court has denied a "wrongful birth" cause of action to parents who allege that physician negligence deprived them of the choice of terminating pregnancy. *See, Gallagher v. Duke University*, 638 F. Supp. 979, (M.D.N.C. 1986).

However, if negligent or intentional conduct in the provision of information or testing *after conception* interferes with a couples decision whether to abort, the Missouri statute prohibits actions based on that misconduct.

As observed in *Wrongful Birth Actions: The Case Against Legislative Curtailment, supra*, by creating a classification that eliminates tort actions only for parents who would have chosen abortion, Section 188.130 R.S.Mo. 1986 burdens the fundamental interest in procreative decision making. The statute does not prohibit recovery for the infringement on the parental right to prevent a defective or healthy child from being conceived but prohibits recovery for infringement on the parental right to prevent a defective child, once conceived, from coming into the world.

To justify the burdening of procreative decision making the statute in question must withstand strict scrutiny which requires that it further a compelling state interest. As pointed out in Point I *supra* this statute fails to further any compelling state interest, and is thus a violation of not only the equal protection clause but the due process clause as well.

The legislative policy of the State of Missouri does nothing to prohibit a "wrongful birth" action based upon negligence in [37] connection with sterilization or birth control, but denies a cause of action based upon negligence frustrating the abortion decision. The statute thus draws an inappropriate distinction unless it is justified further upon appropriate concerns for the health of the mother or the health and safety of a viable fetus, which it is not.

Although Section 188.130 R.S.Mo. 1986 would still be unenforceable as unduly burdensome upon the privacy-based right to chose an abortion when viewed in terms of Fourteenth Amendment protections the statute could have been worded to minimize or eliminate equal protection objections by simply prohibiting "wrongful birth" actions of all kinds, whether based upon sterilization or birth control on the one hand, or abortion on the other. It chose not to do so, and the only logical interpretation of its decision is that the statute in question was intended from the beginning to be an anti-abortion statute, and set apart for unequal treatment those who would elect to chose abortion. Thus, equal protection guarantees have been denied by the statute, and it should be declared unconstitutional.

* * *

[40] * * * prior to enactment of the statute. It is also worthy of note that the Missouri Court of Appeals Western District, and the Supreme Court had refused to reverse the trial court's ruling upon application of the defense in the *Rolf* case. The *Rolf* case is presently pending before the Missouri Court of Appeals Western District on appeal as the result of a dismissal based upon the statute in question.

The general rule is and has been well established in Missouri that statutes operate prospectively only. *See, St. Louis County v. University City*, 491 S.W. 2d 497, 499 (Mo. Banc 1973). That rule controls unless there is clear and unequivocal legislative intent that the statute be given retroactive effect. *Id.* However, even if a statute contains such intent, there are constitutional proscriptions against certain retrospective laws if they adversely effect vested substantive rights. *See, McManus v. Park*, 287 Mo. 109, 229 S.W. 211 (1921); *Lincoln Credit Company v. Peach*, 636 S.W.2d 31 (Mo. Banc 1982); *Department of Social Services v. Villa Capri Homes*, 684 S.W.2d 327 (Mo. Banc 1985).

The Missouri Constitution, Article I, Section 13 prohibits retrospective statutes which impair existing vested rights. *Department of Social Services v. Villa, supra at 332.*

The instant claims are against a physician and they arise from an alleged breach by said physician to conform his treatment to the existing standard of care of the medical profession.

These causes of action are not new torts as alleged by respondents. The elements involved are the same

duty, breach, proximate cause and damage as in all medical malpractice actions. [41] These claims then are clearly causes for medical malpractice, and the terms "wrongful life" and "wrongful birth" are but descriptive labels for the form of malpractice alleged.

Said reasoning is entirely consistent with the court's opinion in *Miller v. Duhart, supra,* where the court held at page 187:

> "Wrongful birth is nothing more than a descriptive label applied to a particular type of malpractice or negligence action. Thus, before damages can be awarded, the siblings are required to demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the injuries claimed."

The Supreme Court of New Jersey in the case of *Procanik v. Cillo,* 478 A.2d 755 (N.J. 1984) observed as follows at page 760:

> The terms "wrongful birth" and "wrongful life" are but shorthand phrases that described the causes of action of parents and children when negligent medical treatment deprives parents of the option to terminate a pregnancy to avoid the birth of a defective child."

As recognized by the U.S. District Court in the case of *Phillips v. United States, supra,* plaintiff's claims are negligence actions for medical malpractice; page 550:

> "Thus, it can readily be seen that plaintiff's claim falls within the traditional boundaries of negligence the essential elements of duty, breach, proximate

> cause, and damage are undeniably present. As in any medical malpractice action, the physician is bound to the standard established by the skill and learning possessed by other members of his profession who are similarly situated. E.g., *Ellis v. United States*, 484 F. Supp. 4 (D.S.C. 1978); *Bessinger v. DeLoach*, 230 S.C. 1, 94 S.E. 2d 3 (1956). See generally W. PROSSER, LAW OF TORTS, Section 32 (4th Ed. 1971)."

All of the causes of action of "wrongful life," "wrongful birth" and "wrongful conception" arise from the same operative factor, the negligence of a physician. The only distinction which exists is that in the first two categories enumerated the * * *.

* * *

(2)

No. 88-362

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT WILSON, et al.,
Petitioners,

vs.

DONALD E. KUENZI, M.D., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

Does the refusal by the Missouri Supreme Court to recognize either "wrongful birth" or "wrongful life" as actionable tort theories under the common law of that state violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

Does this Court have jurisdiction to review a state-court decision on the grounds that it conflicts with the decisions of other state and federal courts on a matter of state law?

Does the standard of appellate review applied by the Missouri Supreme Court in reaching its decision violate the Due Process Clause of the Fourteenth Amendment?

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No. 88-362

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT WILSON, et al.,
Petitioners,

vs.

DONALD E. KUENZI, M.D., et al.,
Respondents.[1]

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

OPINION BELOW

The opinion of the Missouri Supreme Court in this case is reported as *Wilson v. Kuenzi,* 751 S.W.2d 741 (Mo. banc 1988).

JURISDICTION

Petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. §1257(3). However, the federal questions sought to be presented to this Court were not previously

1. Respondent Kuenzi, Hayes, Kirkland & Wilson, M.D.'s, Inc., has no parent company, subsidiary or affiliate.

raised before the state courts of Missouri; this Court is therefore without jurisdiction over the federal questions presented in the Petition for Writ of Certiorari. *Street v. New York*, 394 U.S. 576, 582 (1969).

This Court is without jurisdiction under 28 U.S.C. §1257 to review those questions presented in the Petition for Writ of Certiorari that do not implicate the Constitution or any statute, treaty or other law of the United States.

SUMMARY OF ARGUMENT

The question presented to this Court regarding the constitutionality of the Missouri Supreme Court's decision rejecting recovery under the theories of "wrongful birth" and "wrongful life" was not previously presented to the state courts of Missouri. This Court is therefore without jurisdiction over the question.

The decision not to allow recovery for "wrongful birth" or "wrongful life" does not violate a woman's qualified right to choose an abortion without state interference, since it erects no obstacles in a woman's path to an abortion in addition to those existing obstacles not created by the state. The decision does not violate equal protection, since it is rationally related to a legitimate governmental goal.

This Court does not have jurisdiction to resolve conflicts among the states regarding the interpretation of their own tort law.

Petitioners' contention that the Missouri Supreme Court applied an inappropriate standard of review does not present a reviewable federal question.

REASONS FOR DENYING THE WRIT

I. This Court is without jurisdiction over the Petition for Certiorari, in that the federal questions raised therein were not previously presented to the state courts of Missouri.

Of the three questions presented by the Petition for Writ of Certiorari (the "Petition"), only two are subject to this Court's jurisdiction. Furthermore, neither of these questions was presented to the state courts of Missouri for decision. This Court is therefore without jurisdiction over any question sought to be raised in the Petition.

The sole statute authorizing this Court to exercise appellate jurisdiction over decisions rendered by state courts is 28 U.S.C. §1257. That statute only authorizes this Court to review state court decisions to the extent such decisions implicate a question of federal law. Of the three questions recited in the Petition, only two make reference to a source of federal law. The third question involves only a conflict among state courts (and federal courts applying state law) concerning a matter of state tort law.

Although the remaining two questions presented in the Petition ostensibly implicate matters of federal law, neither of these two questions was raised before the state courts of Missouri at any stage of the proceeding. Consequently, this Court is without power to review them. *Street v. New York*, 394 U.S. 576, 582 (1969).

The first of these questions is whether the Missouri Supreme Court's decision not to recognize a common-law right of recovery in tort under the theories denominated

"wrongful birth" and "wrongful life" violates petitioners' rights under the Fourteenth Amendment to the United States Constitution. This question, in turn, consists of two related inquiries under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, respectively. This general question and its constituent inquiries were not presented to or addressed by either the trial court or the Missouri Supreme Court.

The focus of the parties before the trial court was the effect of a Missouri statute, Mo. Rev. Stat. §188.130 (1986), which purported to eliminate recovery in tort under either "wrongful birth" or "wrongful life." The trial court granted Respondents' motion to dismiss the petition based on the operation of §188.130. See *Wilson v. Kuenzi*, 751 S.W.2d 741, at 741 (1988). In their brief to the Missouri Supreme Court, petitioners challenged the constitutionality of this section. See Petitioners' Appendix E. In their responsive brief, respondents urged that it was unnecessary to consider the constitutionality of this statute, since the common law of Missouri did not, and should not, recognize recovery under either of these two proffered theories of recovery. See Appendix A. Petitioners, in their reply brief, returned to their previous argument that the statute was unconstitutional. See Appendix B. Petitioners did not raise the alternative argument raised before this Court, that a decision to reject the two tort theories in question as a matter of common law would be constitutionally impermissible. *Id.*

The Missouri Supreme Court, in its decision, agreed with respondents' position, that the common law of Missouri does not recognize a right of recovery in tort for

either "wrongful birth" or "wrongful life." See Petitioners' Appendix A. That court concluded that it was therefore unnecessary to consider the arguments raised by petitioners as to the constitutionality of the statute. *Id.* Although petitioners filed a motion for rehearing, they did not question the constitutionality of the common law rule announced by the court in its decision. See Petitioners' Appendix B.

The question whether a given decision under a state's common law of tort is unconstitutional is clearly parallel to the question of the constitutionality of a state statute that accomplishes the same result. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). Nevertheless, these two questions are distinct judicial inquiries, and a party who desires a court to address both these questions should be required to raise each of them in sufficiently clear terms to indicate to the court that they must both be addressed. Specifically, where a party is challenging the constitutionality of a statute, and it is apparent that a particular result under the common law would render the statute moot, that party should be required to raise whatever challenge it may have to the common law result before the state courts in order to properly preserve that question for review through certiorari. In this case, petitioners did not present to the state courts of Missouri the question whether the refusal to recognize "wrongful birth" or "wrongful life" under that state's common law would violate the Constitution. Consequently, this Court has no jurisdiction to consider the question. *Street*, *supra*.

The other question petitioners seek to raise in their Petition is whether the scope of appellate review em-

ployed by the Missouri Supreme Court violated the Equal Protection Clause of the Fourteenth Amendment. Although petitioners objected to the scope of review in their motion for rehearing, petitioners did not frame their objection with reference to any source of federal law. See Petitioners' Appendix B. Since petitioners did not present the federal implications of their scope of review challenge, this Court has no jurisdiction to entertain that challenge in this proceeding. *Street, supra.*

II. The decision of the Missouri Supreme Court refusing to recognize either "wrongful birth" or "wrongful life" as a valid theory of recovery under the common law of Missouri does not violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In its decision in this case, the Missouri Supreme Court held that petitioners did not state a claim for relief under Missouri law. Petitioners had alleged that Barbara Wilson received medical care from respondents during her pregnancy, and that respondents negligently failed to inform her that the fetus she carried would be born with Downs' Syndrome. Petitioners also alleged that, had she been so informed, Barbara Wilson would have aborted her pregnancy. In rejecting petitioners' claim for damages as a matter of law, the Court focused on the remoteness of the causal link between the act of neglect complained of and the injury alleged to have resulted therefrom (that Barbara Wilson's child was born with a congenital defect). The Court also noted that a mother's allegation, in a case such as this, that she would have aborted her fetus had she known of its defective condition would be uniquely suscep-

tible to fabrication, and should therefore not provide the basis for an action at law.

The Missouri Supreme Court's decision in this case does not violate the principles recognized by this Court in *Roe v. Wade*, 410 U.S. 113 (1973). In that case, this Court recognized the right of pregnant women to choose whether or not to abort their pregnancies, at least during the early phase of gestation, without interference by the states. This right to be free from state interference with the abortion decision was found to emanate from the Due Process Clause of the Fourteenth Amendment. Subsequent decisions of this Court, however, have made it clear that the principles announced in *Roe v. Wade* only prevent a state from erecting additional barriers to the abortion decision, and do not require a state to ameliorate or remove any obstacles to the making of that decision which are not themselves created by the state. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

In *Maher*, this Court addressed a challenge to a Connecticut regulation which denied Medicaid funding for all but non-therapeutic abortions. The Connecticut Medicaid program nevertheless provided funding for costs associated with natural childbirth. Although the indigency of pregnant medicaid recipients constituted a limitation on their ability to choose abortion, this Court concluded that the state's refusal to alleviate this limitation—even while assisting those who choose not to abort—did not create an impermissible burden on their right to choose. As this Court stated:

> [t]he Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant

> woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe*.

Id., 432 U.S. at 473-74.

Like the regulation upheld in *Maher*, the decision by the Missouri Supreme Court in this case placed no additional obstacles in the path of a woman's decision whether to abort. Here, the crux of petitioners' claim is that Barbara Wilson was prevented from choosing abortion by respondents' failure to provide her with certain genetic testing information. The Missouri Supreme Court concluded that such a failure could not provide the basis of a claim for damages. This decision, even had it been in effect at the time of Barbara Wilson's pregnancy, could not possibly have interfered with her decision whether or not to obtain an abortion. This is particularly true since the existence of a cause of action for "wrongful birth" or "wrongful life" would be of no concern to a woman who believed her fetus to be healthy.

The only conceivable limitation on Barbara Wilson's opportunity to choose an abortion was imposed, if at all,

by her physician. Any such impediment was not erected by the state, and the state was under no obligation to remove it. Since the State of Missouri's refusal to recognize recovery for "wrongful birth" or "wrongful life" did not impose any limitations on the abortion decision that did not already exist, that refusal does not violate the constitutional rights recognized in *Roe v. Wade*. A similar conclusion, in the context of a statute precluding recovery under these two theories, was reached in *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986). There, the court stated that

> if the doctor's inadvertence or carelessness places an obstacle in the path of plaintiff's abortion decision-making, it is placed there by the doctor, not the state. The doctor, not the state, is precluding the patient from making an informed abortion decision. Nor is the doctor's conduct, which is negligence, a form of private discrimination. A doctor who inadvertently fails to provide certain treatment is not engaged in invidious partiality; he is only failing to use due care.

Id., 396 N.W.2d at 17. Furthermore, this Court has previously declined to review a state court decision identical to the one in this case, even though the questions presented in the petition for certiorari were the same as those raised by petitioners herein. See Petition for Writ of Certiorari, *Azzolino v. Dingfelder*, U.S.S.Ct. Docket No. 85-6969 [337 S.E.2d 528 (N.C. 1985), *rehearing denied*, 353 S.E.2d 401 (1987), *cert. denied*, ... U.S. ....., 107 S.Ct. 131 (1986)].

For similar reasons, the decision by the Missouri Supreme Court in this case did not deny petitioners the equal protection of the law. Unless it has a substantial

impact on a fundamental interest or affects with particularity some protected class, a classification imposed by state law must only satisfy the "rational basis" test; that is, it must be rationally related to a legitimate governmental interest. *Lyng v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,* ..... U.S. ....., 108 S.Ct. 1184, 1192 (1988). In the present case, there is no protected class which is affected by the Missouri Supreme Court's refusal to recognize petitioners' tort claims. Furthermore, the only fundamental interest that could even arguably be impacted by the Missouri Supreme Court's decision in this case is the right to choose abortion without interference from the government. As suggested by the previous discussion, this fundamental right is not substantially impacted by the Missouri Supreme Court's decision, since it erected no state-imposed obstacles in the pregnant woman's path to an abortion. *Hickman, supra,* 396 N.W. 2d at 17. Consequently, the rational basis test applies to petitioners' equal protection claim.

The decision by the Missouri Supreme Court in this case clearly satisfies the requirements of the rational basis test. That test contains two substantive limitations on classifications imposed by state law: the classification must implicate legitimate goals, and it must bear a rational relationship to those goals. *Lyng, supra,* 108 S.Ct. at 1194. The particular classification objected to by petitioners is the classification which distinguishes between plaintiffs asserting claims for either "wrongful birth" or "wrongful life" and those asserting claims under the theory known as "wrongful conception." This classification is not only identified with a legitimate tort-law goal, but is a well-reasoned means of furthering that goal.

As noted by petitioners, the courts of Missouri have recognized a tort cause of action under the theory of "wrongful conception." *Miller v. DuHart,* 637 S.W.2d 183 (Mo. App. 1982). This claim arises where a physician has negligently performed a requested sterilization or contraceptive procedure, resulting in the birth of a healthy, but unplanned, child. The classification that permits tort recovery under such circumstances but denies recovery under the circumstances presented in this case clearly implicates a legitimate goal. This goal is the restriction of tort recovery to those situations in which there is a proximate causal link between the acts of neglect complained of and the injury claimed to be the result.

Furthermore, the classification in question bears a rational relationship to this goal. In the case of a claim for "wrongful conception," there is a clear causal link between the act of neglect—the improperly-performed sterilization or contraceptive procedure—and the injury claimed to be the result—the birth of a healthy, but unplanned, child. In the case of a claim for "wrongful birth" or "wrongful life," however, the causal link is much more attenuated. There, the act of neglect complained of is the failure to provide genetic testing information that a woman may consider relevant to her decision whether to continue her pregnancy to full term. The injury claimed to have resulted is the birth of a congenitally-defective child. Since the child's defective condition is congenital, there is nothing that the treating physician could have done either to prevent this condition or to cure it. The Missouri Supreme Court consequently concluded that the causal link in such cases was too remote to support the recovery of damages. This

conclusion is sufficiently rational to establish that the classification distinguishing between "wrongful conception" and "wrongful birth" or "wrongful life" is rationally related to the goal of confining tort recovery to those instances where proximate causation is shown.

III. This Court is without jurisdiction to resolve conflicts between state courts regarding matters of purely state law.

Petitioners' argument notes that most of the courts that have been presented with the question have permitted recovery in tort for either "wrongful birth" or "wrongful life." Included among these are several federal courts. Only the state supreme courts of Missouri and North Carolina have rejected recovery under these two theories. See *Azzolino v. Dingfelder, supra.*

Petitioners urge this Court to resolve this conflict among the jurisdictions as to whether to permit recovery for "wrongful birth" or "wrongful life"; however, petitioners do not attempt to suggest that this conflict concerns a matter of federal law. Furthermore, those federal courts that have considered claims under these two theories have recognized that the questions presented in such cases are purely matters of state law. See, *e.g., Robak v. United States,* 658 F.2d 471 (7th Cir. 1981) (applying Alabama law); *Phillips v. United States,* 408 F.Supp. 544 (D. S.C. 1981) (applying South Carolina law).

This Court is without jurisdiction to review by certiorari decisions of state courts with respect to matters of state law. 28 U.S.C. §1257. This Court is therefore without power to resolve the conflict noted by petitioners.

IV. The rejection of a tort theory based in part on the unverifiability of the assertions on which it rests does not implicate federal constitutional principles.

Petitioners contend that the Missouri Supreme Court exceeded the applicable scope of review in this case by failing to accept as true petitioners' allegations with respect to causation and damages. This argument misapprehends the fundamental principles of appellate review. Furthermore, the argument fails to present any federal question reviewable by this Court under 28 U.S.C. §1257.

Under Missouri law, an appellate court reviewing a trial court's dismissal of a petition for damages must assume as true all those facts pleaded, together with any reasonable inferences to be drawn therefrom. *Friedman v. Edward L. Bakewell, Inc.*, 654 S.W.2d 367, 368 (Mo. App. 1983). However, conclusions contained in the petition are not to be considered. *Id.* Petitioners' argument misapprehends these principles when it states that

> [u]nder the permissible scope of review, Petitioners were to be presumed to have satisfied the evidentiary hurdles of causation and damages, if their petition adequately set forth these elements, which it did.

Petition for Writ of Certiorari, at 17. It is axiomatic that the existence of legally-sufficient causation and legally-cognizable damages are matters requiring the application of law to the facts, and are therefore conclusions. Consequently, it was appropriate for the Missouri Supreme Court to consider whether the injuries claimed by petitioners were proximately caused by the acts of neglect they complained of. It was also appropriate for the Court to consider the difficulty courts have experienced in determining

an acceptable measure of damages for "wrongful birth" when deciding whether to recognize this theory of recovery.

Petitioners' argument seems to be addressed to the discussion in the Missouri Supreme Court's opinion regarding the problem of verifiability inherent in an action for "wrongful birth." The Court's opinion recognized that such an action must be premised upon the assertion that the mother would have aborted her child had she known of its defective condition. The Court was clearly troubled by the fact that a woman making such an assertion as part of a claim for "wrongful birth" would necessarily be doing so "long after the fact and when it is in her financial interest to do so." *Wilson v. Kuenzi*, *supra*, 751 S.W.2d at 746. The Court concluded that an action for damages should be based on evidence "either more verifiable based upon experience or more verifiable by some objective standard." *Id.*

By focusing on this problem of verifiability, the Missouri Supreme Court was not refusing to presume the truth of the matters alleged by petitioners. Instead, the Court was taking into account a public policy consideration traditionally employed in the tort calculus: the risk that certain classes of tort claims will be overly-susceptible to collusion or fabrication. The relevance of such a risk has been considered, for example, in determining whether or not to preserve interspousal tort immunity. See *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 652 (Mo. banc 1986) (abolishing interspousal tort immunity). Thus, the decision by the Missouri Supreme Court in this case did not deviate from the relevant standard of appellate review.

CONCLUSION

The decision by the Missouri Supreme Court to reject the theories of "wrongful birth" and "wrongful life" does not violate any principle of federal law, and is therefore not reviewable by this Court. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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APPENDIX

"APPENDIX A"

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN DISMISSING APPELLANTS' FIRST AMENDED PETITION, IN THAT NEITHER "WRONGFUL BIRTH" NOR "WRONGFUL LIFE" IS A VALID THEORY OF TORT RECOVERY IN MISSOURI, AND SUCH PETITION THEREFORE FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED.

A. It is unnecessary to address either the retrospective effect or the constitutional validity of the statutory prohibition against maintaining an action for "wrongful birth" or "wrongful life" (§188.130, RSMo 1986), since the statute is both an expression of the relevant public policy against recovery under either theory at common law and a precedential basis for rejecting such recovery.

* * *

B. Even in the absence of the statute, the recognition of recovery under either theory would be an unwarranted extension of the common law.

Even were there no such statute as §188.130, there would be sufficient reasons for this Court to refuse to recognize recovery under the common law for either "wrongful birth" or "wrongful life." Most important of these is that the recognition of a cause of action which has

as its genesis the complaint that a life already in being was caused not to be terminated by the acts of the defendant is an unwarranted and unprincipled extension of the common law.

The New York Court of Appeals succinctly stated the rationale for rejecting the theory of "wrongful life" in *Becker v. Schwartz, supra.*

> Simply put, a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make. * * * Recognition of so novel a cause of action requiring, as it must, creation of a hypothetical formula for the measurement of an infant's damages is best reserved for legislative, rather than judicial, attention.

Id., 386 N.E.2d at 812

* * *

Unlike the court in *Azzolino*, this Court may at least be assured that the legislature has considered and resolved the policy issues presented by this case. The result of their deliberations is available to inform this Court as to its decision in this case, and to assure this Court of the resolution of future cases. However, even if this statute were not available to this Court, it would be the responsibility of this Court to defer any affirmative steps towards the adoption of "wrongful birth" or "wrongful life" until such time as the General Assembly had spoken.

C. The United States Constitution does not require states to recognize recovery under their common law either for "wrongful birth" or "wrongful life."

Appellants' brief focuses on the question of whether the prohibition in §188.130 against maintaining a cause of action for "wrongful birth" or "wrongful life" violates the United States Constitution, in light of Roe v. Wade, 410 U.S. 113 (1973). Since the conclusion that there is no remedy for "wrongful birth" or "wrongful life" can be reached according to common law principles, it is unnecessary to address the constitutionality of §188.130. However, appellants' argument does suggest that such a common-law rejection of recovery would also violate the Constitution. Furthermore, it is clear that the constitutionality of a provision of state law does not depend upon whether it was enacted by its legislature or was established by the decisions of its courts. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (in determining constitutionality of rule of state libel law, it is irrelevant whether rule derives from statutory or decisional law).

* * *

* * * ful life" theories. So long as the rule of law which results from this application of public policy does not affirmatively interfere with the abortion decision, *Roe v. Wade* and its progeny create no obstacle to the rejection of either of these two theories.

In the present case, the relevant public policy considerations have been resolved by the General Assembly. This resolution occurred subsequent to the announcement of *Roe v. Wade*, and, to the extent that case established new or additional policy factors, such factors were presumably given their appropriate weight in the legislative determination.

D. Since there is an available legal theory supporting the dismissal of the petition which does not involve the validity of a statute, the trial court's judgment should be affirmed.

In summary, respondents' argument is that it is unnecessary to reach the questions raised in this case regarding the constitutionality, and the constitutionality of applying, §188.130. The judgment in the present case may be affirmed on the basis that there is no common law recovery in Missouri for either "wrongful birth" or "wrongful life." This Court should avoid deciding questions involving the constitutionality of a statute, where there is an alternative way of resolving an appeal. State ex rel. Union Electric Company v. Public Service Commission, 687 S.W.2d 162, 165 (Mo. banc 1985). The existence of the legislative determination of the relevant issues does, however, support the rejection of the two proposed theories as a matter of common law.

It is irrelevant that the trial court stated a different legal rationale for its dismissal of appellants' petition. L.F. at 89-98. The judgment in a court-tried case is to be affirmed if there is available any reasonable legal theory on which to do so. McFadden v. Kelly, 722 S.W.2d 110, 113 (Mo. App. 1986).

For the reasons stated, the judgment of the trial court dismissing appellants' First Amended Petition should be affirmed.

"APPENDIX B"

ARGUMENT

POINT I

RESPONDENTS ANTI-ABORTION PUBLIC POLICY ARGUMENTS ARE FLAWED AND ARE CONTRARY TO THE PREVAILING WEIGHT OF JUDICIAL AUTHORITY.

This reply begins by noting that respondents have adopted appellants' statement of facts. Applicable law requires that the facts established in said statement be viewed in the light most favorable to the appellants and all reasonable inferences therefrom that favor appellants be drawn. *Shapiro v. Columbia Union National Bank and Trust Company,* 576 S.W. 2d 310 (Mo. Banc. 1978).

It should also be noted at the outset that the respondents have failed to respond in their brief to Points II, IV and V of appellants brief and that the arguments and authorities cited therein stand before the court unchallenged.

The main thrust of respondent's argument as repeated time and time again throughout their response is that anti-abortion public policy considerations dictate and justify the original enactment, and continued existence of Section 188.130 R.S.Mo. (1986). Respondent's accord to the statute the status of a "legislative commandment" (respondent's brief, page 11). In their view, since the statute embodies what respondents perceive as public policy, the court need not concern itself with the statutes constitutionality but should simply rubber stamp its validity based upon its enactment alone. Fortunately, courts function as a check and/or balance, not a mere rubber stamp of legislative enactment.

The antiquated public policy argument advanced by respondents has no place in modern day jurisprudence and has been repudiated by the overwhelming majority of courts considering same. It flows from the holding of the New Jersey Supreme Court in the case of *Gleitman v. Cosgrove*, 227 A.2d 689 (1967). The *Gleitman* case was the first reported case to consider the validity of the causes of action of wrongful birth and wrongful life. The court ruled against both concepts. Since *Gleitman* the United States Supreme Court has recognized that women have a constitutional right to choose to terminate a pregnancy. *Roe v. Wade*, 410 U.S. 113 (1973).

Subsequent to *Roe, supra*, the holding of the *Gleitman* case was reconsidered by the New Jersey Supreme Court in the case of *Berman v. Allen*, 404 A.2d 8 (1979). The court reversed its earlier holding in *Gleitman*, and repudiated the view espoused by that case that public policy reasons precluded the judicial allowance of tort damages for denial of the opportunity to take embroyonic life. The court in fact determined that since *Roe, supra*, public policy now supports the right of a woman to choose to terminate a pregnancy.

Discussing the public policy argument advanced by the *Gleitman* court the court in *Berman* observed at page 14:

> "In light of changes in the law which have occurred in the 12 years since *Gleitman* was decided the second ground relied upon by the *Gleitman* majority (anti-abortion public policy grounds) can no longer stand in the way of judicial recognition of a cause of action founded upon wrongful birth. The Supreme Court's ruling in *Roe v. Wade, supra*, clearly establishes that a woman possesses a constitutional

right to decide whether her fetus should be aborted, at least during the first trimester of pregnancy. Public policy now supports, rather than militates against, the proposition that she not be impermissibly denied a meaningful opportunity to make that decision."

Representative of respondent's position is the following excerpt from respondent's brief at page 11:

> "Furthermore, apart from its status as a legislative commandment having the force of law, Section 188.180 (correct section is 188.130) is a resource for the courts of this state in exercising their judgment on questions of common laws similar to those addressed in the statute. It is therefore unnecessary to reach those questions regarding the constitutionality or the applicability of Section 188.130 . . . The existence of the statute is itself a sufficient reason to conclude that as a matter of common law there is no recovery in Missouri for either wrongful birth or wrongful life."

Such reasoning is flawed and ignores constitutional guarantees which must be satisfied in connection with laws enacted which affect individual's basic vested rights.

The public policy considerations which respondent's allege the statute in question embodies are compelling according to respondents because in their view appellants causes of action seek damages against Dr. Kuenzi, et al., for "failing to perform an abortion," or "having failed to extingush a human life."

Such reasoning on the part of respondents is again flawed and mischaracterizes the basis of appellants lawsuit. A review of appellant's allegations of negligence in their First Amended Petition for Damages at (legal file, pages 2, 3 and 4) clearly shows that nowhere in

the pleadings is any recovery sought for failure to cause an abortion or failure to extinguish human life. The allegations set forth are stated in traditional terms of medical malpractice pertaining to breach of the applicable standards of care of a physician in the care and treatment of his patient.

The anti-abortion public policy considerations delineated by respondents in their brief which would allegedly be compromised by recognition of appellant's causes of action are unconstitutional under a long line of case authority.

As shown in appellant's brief under *Roe v. Wade, supra*, only two public policy interests have been recognized as compelling so as to justify enactment and enforcement of Section 188.130 R.S.Mo. (1986), i.e., (1) protecting the woman's health and (2) protecting the potentiality of human life. Only when the fetus reaches viability would the state's interest in protecting and furthering the value of human life become a compelling interest to justify regulation of the abortion decision. *Roe*, 410 U.S. at 159. The court specifically declined to accept the argument that life begins at conception and is present throughout pregnancy. The state is prohibited from adopting one theory of when life begins to enable it to argue that its interest in protecting and furthering life should override the rights of a pregnant woman to choose abortion. *Roe*, 410 U.S. at 162. In the instant case all of the alleged acts of negligence of Dr. Kuenzi occurred prior to viability of the fetus, during a time when Mrs. Wilson would have been entitled to abort her pregnancy under the guidelines of applicable constitutional law. Therefore, there is no public policy which justifies the continued existence of this statute and nothing set forth in respondents brief alters said fact.

Public policy does not favor medical malpractice and suffering. Public policy as embraced by the constitution

of the State of Missouri favors full compensation of an injured party. Public policy also should include a regard for social welfare as affected by careful genetic or other medical counseling through recognized medical procedures. For a court to be encouraged to stand behind a shield of public policy as suggested by respondents, is, in effect, to declare that it is the public policy of the state to immunize doctors from responsibility for their negligence which ultimately results in the birth of a human being who must live with severe birth defects. In such instance the respondents conception of public policy would deny the severely injured child from recovering damages from a clear tortfeasor.

Further, the respondents reasoning places the burden of the child's defects on the parents, the state, society and everyone except the responsible party, the physician. Such result is totally unnecssary in light of the dramatic increase in the quantity and quality of prenatal technology now routinely available in the medical community to test for and identify birth defects.

The Supreme Court of Washington in *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wa. 1983) recognized the advances in medical technology and its impact on tort law when it observed at page 491:

> "Until recently, medical science was unable to provide parents with the means of predicting the birth of a defective child. Now, however, the ability to predict the occurrence and reoccurrence of defect attributable to genetic disorders has improved significantly . . . After conception, new diagnostic techniques such as amniocentesis and untrasonography can reveal defects in the unborn fetus. . . Parents may avoid the birth of the defective child by aborting the fetus. The difficult moral choice is theirs . . . we

> believe we must recognize the benefits of these medical developments and therefore we hold that parents have a right to prevent the birth of a defective child and health care providers a duty correlative to that right. This duty requires health care providers to impart to their patients material information as to the likelihood of future children's being born defective, to enable the potential parents to decide whether to avoid the conception or birth of such children."

The court's final observation at page 491 directly refutes respondent's public policy arguments:

> "The duty does not, however, affect in any way the right of defendant physician to refuse on moral or religious grounds to perform an abortion. Recognition of the duty will promote societal interests in genetic counseling and prenatal testing, deter medical malpractice, and at least partially redress a clear and undeniable wrong."

Far from infringing upon public policy, recognition of the individuals right to recover damages furthers societal interests in promoting quality prenatal health care. Society has a recognized interest in insuring that prenatal screening and diagnosis are performed safely and accurately. Medical professionals have a strong need to keep up their proficiency, be aware of recent developments in their field, recognize their shortcomings, and carry out their work in a setting with an optimal standard of quality control. Free access to the courts for redress of physicians failure to comply with the applicable standards insures that doctors will exercise due care in prenatal counseling and provide parents with the information they are entitled to receive to enable them to make informed procreative decisions.

POINT II

RESPONDENTS RELIANCE ON THE RATIONALE OF THE DECISION IN *MAHER v. ROE,* 432 U.S. 464 (1973) AS AUTHORITY EVIDENCING APPROVAL OF THE STATE OF MISSOURI'S SECTION 188.120 R.S.Mo. IS IN ERROR.

Respondents citing the case of *Maher v. Roe,* 432 U.S. 464 (1973) argue that Section 188.130 R.S.Mo. (1986) does not interfere with the constitutionally protected right to choose abortion because a pregnant woman is still free to elect to choose abortion; the statute merely embodying the state's decision not to facilitate abortion. *Maher v. Roe, supra,* held that a state's refusal to fund abortions does not infringe the exercise of fundamental rights because although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Respondents argument is flawed because the abortion funding cases have no relevance in evaluating the constitutionality of wrongful birth legislation. State funding decisions do not directly affect physician-patient communications and do not constrain information essential to a woman's decision making. Although lack of state funds for abortions may influence the outcome of a woman's choice or affect her ability to carry out her decision not to bear a child, lack of relevant and reliable medical information precludes informed choice altogether.

POINT III

RESPONDENT'S ARGUMENT AND AUTHORITIES REPRESENT A DECIDED MINORITY VIEW PERTAINING TO WRONGFUL LIFE, AND WRONGFUL BIRTH ACTIONS.

Respondents throughout their brief rely time and time again on the cases of *Becker v. Schwartz*, 386 N.E. 2D 807 (1978) and *Azzolino v. Dingfelder*, 337 S.E.2D 528 (N.C. 1985). These decisions are presented as authority for respondent's public policy and causation arguments. It is interesting to note that the *Becker* case is in fact in accord with the majority view adopted by appellant's which recognizes a cause of action for wrongful birth. Respondent's have been forced to resort to quoting from the dissent in that case to find authority for their position. The *Azzolino* case is a North Carolina case and represents a minority view which the Federal District Court of North Carolina refused to follow in the 1986 case of *Gallagher v. Duke University*, 638 F.Supp. 979 (M.D.N.C. 1986). The *Gallagher* decision recognized a cause of action for wrongful birth.

Respondent's limited authorities cited in their brief represent only a decided minority view. The overwhelming weight of judicial authority, 17 jurisdictions, (appellant's brief, pages 19-20), recognize a cause of action for wrongful birth, and four jurisdictions (appellants brief, page 21), recognize a cause of action for wrongful life.

* * *